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INDICTMENTS AGAINST ALLEGED DYNAMITERS

Here are two indictments brought against the three alleged dynamiters now in the county jail. The first is for murder against the McNamaras, and others for alleged dynamiting of the newspaper building at Broadway and First street, and is a sample of the 19 similar ones. The second is against McManigal, J. J. McNamara and others for the blowing up of the Llewellyn iron works:

"In the superior court of the state of California, in and for the county of Los Angeles.

"The people of the state of California, plaintiff, vs. M. A. Schmidt, J. B. McNamara, J. J. McNamara, William Caplan, John Doe, Richard Roe, John Stiles and Jane Doe, defendants.—Indictment.

"The Grand Jury of Los Angeles county, in the name and by the authority of the people of the state of California, accuse M. A. Schmidt, J. B. McNamara, J. J. McNamara, William Caplan, John Doe, Richard Roe, John Stiles and Jane Doe of murder, committed as follows:

"Heretofore, to wit: On the first day of October, 1910, at and in the county of Los Angeles, and state of California, and before the finding of this indictment, the said M. A. Schmidt, J. B. McNamara, J. J. McNamara and William Caplan, and John Doe, Richard Roe, John Stiles and Jane Doe, whose true names are to the grand jurors aforesaid unknown, did then and there willfully, unlawfully, feloniously and with malice aforethought, kill and murder one A. Churchill Harvey-Elder, a human being.

"In the superior court of the state of California, in and for the county of Los Angeles.

"The people of the state of California, plaintiff, vs. O. E. McManigal, J. J. McNamara, John Doe, Richard Roe, John Stiles and Jane Doe, defendants.—Indictment.

"The grand jury of Los Angeles county, in the name and by the authority of the people of the state of California, accuse O. E. McManigal, J. J. McNamara, John Doe, Richard Roe, John Stiles and Jane Doe, whose true names are to the grand jurors aforesaid unknown, of the crime of maliciously depositing and exploding, and attempting to explode dynamite, nitroglycerin, nitrogelatin, and other chemical compounds and explosives, with intent to injure and destroy buildings, and to injure, intimidate and terrify human beings, a felony, committed as follows:

"Heretofore, to-wit: on the 25th day of December, 1910, at and in the county of Los Angeles, state of California, and before the finding of this indictment, the said O. E. McManigal, J. J. McNamara, John Doe, Richard Roe, John Stiles and John Doe did then and there willfully, unlawfully, feloniously and maliciously deposit, attempt to explode and explode at, in, under and near the building, office and foundry of the Llewellyn Iron works, a corporate body, at and near the corner of Main street and Redondo street, in the city of Los Angeles, county of Los Angeles, state of California, dynamite, nitroglycerin, nitrogelatin and other chemical compounds and explosives, with the intent then and there and thereby to injure and destroy said building, office and foundry of the said Llewellyn Iron works, and with the intent then and there and thereby to injure, intimidate and terrify certain human beings, to-wit: Reese Llewellyn, John Llewellyn, William Llewellyn, David E. Llewellyn, Walter Taylor, Sprigg Harwood and the stockholders, proprietors, directors and employees of said Llewellyn Iron works in the said building, office and foundry; that said building, office and foundry was, then and there, a place where human beings usually inhabited, assembled, frequented, passed and repassed."

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FOREWORD

TO SECOND EDITION

When we began putting the text matter for this Course in pamphlet form, instead of in bound volumes of books, and mailing the lessons out from week to week and month to month, a few lessons at a time, we anticipated greater satisfaction on the part of our students.

But we were not prepared to expect the tremendous results which we have really achieved.

The percentage of students who actually keep up the Course under the new plan is over **THREE** times as great as under the old.

This great appreciation of the Course in its present form, combined with the really remarkable satisfaction our students express with our **PERSONAL** instruction and **INDIVIDUAL** attention to quizzers, examinations, and consultation inquiries, has caused our enrollment of students to increase by leaps and bounds.

The result is that this second edition of the Course in this form is made necessary almost six months in advance of the time we had planned for it.

It is with heartfelt appreciation of the good work and co-operation of our present student-body and with full assurance and determination that those enrolling hereafter shall likewise not find their confidence in us misplaced that we offer this second edition of our Extension Law Course.

A. C. BURNHAM

President

January 1911

American Extension School of Law, Chicago

Announcement
1911

American Extension University

(Non-Resident Instruction)

CHARTERED UNDER THE LAWS OF CALIFORNIA

Department of Law

FRANK C. SMITH, LL. B., Dean

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1911

**"The great problem of America to-
day is that of ADULT education."**

--Chas. W. Eliot.

gift of John Adams

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AMERICAN EXTENSION UNIVERSITY
(NON-RESIDENT INSTRUCTION)
CHARTERED UNDER THE LAWS OF CALIFORNIA

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AMERICAN EXTENSION UNIVERSITY .

PRELIMINARY STATEMENT

The American Extension University is chartered under the laws of the State of California, as an educational institution, and is authorized to give instruction either to resident students, or by correspondence, and to confer all appropriate honors and degrees.

The Extension Law Department of the University gives a complete course in Law by correspondence, leading to the degree of Bachelor of Laws,—LL.B.

NEED OF THIS COURSE.—Within the past three years, four different institutions have offered such a course and the remarkable combined enrollment of over 30,000 students secured by them within eighteen months of organization, is sufficient evidence of the demand for training by this method.

The President of the American Extension University was the prime mover in the organization of two of these institutions and was the active business manager of three of them during their inception and early development. He is probably better informed, both as to the strength and weakness of the policies of these organizations than any other living man. He was also for many years an exceptionally successful teacher in one of America's largest regular State Universities.

Besides being for several years a post-graduate student of two of the largest universities in this country and of Paris, Gottingen and Berlin in Europe, he has himself taken four different correspondence courses in as many different schools, and is thus thoroughly familiar with the *actual practice* of the *best* of these institutions, as well as with the most up-to-date and *effective methods* yet devised for correspondence instruction in general

It is believed that, in spite of the good work being done by the institutions already in the field, there are *three* certain respects in which *all Extension* and *Correspondence* courses, heretofore offered, fall short. These deficiencies are:

1. The present courses are too expensive;
2. The present courses are too detailed and extensive and require too much time for the busy man of today;
3. The present courses do not give enough attention to the statutory laws or codes of the different States.

The American Extension University Law Course is less expensive, occupies one's spare time for but two years, is *guaranteed* to prepare one to pass the legal examinations for the bar of any State, and carries with it the highest legal honors given at graduation from the best residence universities,—the degree of Bachelor of Laws.

This course is the *only* Law course given by mail where the lessons and instruction are mailed weekly, and not delivered in bulk for the full course, and where the Faculty keeps in close personal touch with the students and actually gives their work constant personal supervision. And it is the *only* one where the lessons on Pleading and Practice, and on the Statutes and Codes, are made *practical* and take into account the vital differences in different States.

The Dean of the Law Faculty has an *international reputation* as a Law writer and editor. He was the original editor of "The American Lawyer," for twenty years has been law editor of "The American Banker," and for seven years held also a like editorship with "The Financier," all of New York City. He instituted, and was the editor of the early volumes of the American and English Railroad Cases, New Series, and the American and English Corporation Cases, New Series, serial law works of recognized authority.

As Secretary some years ago, of the Committee on Law Reporting and Digesting, of the American Bar Association, his investigations and reports were the marked features of the Committee's work, and received international notice. Scarcely less prominent, was his service, at about the same time, as Secretary of the Committee on International Arbitration, of the New York State Bar Association.

In practice he has been in close affiliation always, with banking, corporation, commercial and like business interests, and is, in all respects, eminently fitted for the Deanship of our Law Course, designed primarily to meet the needs and conditions of modern business life, and the modern business man. He is now resident in Los Angeles, and will give the work of our students his personal attention and care.

The Faculty is composed of strong men—each a specialist in the lines assigned to him, and each having *practical business* and *professional experience* in addition to being a *skilled teacher*.

GUARANTEE

The University gives an *absolute guarantee* to fit each student to pass the Bar Examinations of any State he may chose, without any expense farther than the amount for which he contracts.*

A PRACTICAL COURSE

This course is SHORT, PRACTICAL, INEXPENSIVE and GUARANTEED to be sufficient. It, therefore, meets *all* the needs of *any* person, desiring a knowledge of Law for *any* purpose and who is unable to attend a resident school.

WHO SHOULD STUDY LAW.—The study of the law particularly appeals to three classes of men:

1st. Those who undertake the study with the intention of taking up the law as their life profession;

2nd. Those who desire a knowledge of the law as a part of a liberal education;

3rd. Business men.

To each of these three classes the Extension Law Department of the AMERICAN EXTENSION UNIVERSITY offers exceptional advantages.

The law student receives a course of preparation for the Bar Examination and for actual practice—far more complete and thorough than that given in any other Correspondence or Extension law course, or even in the great majority of the resident law schools. The course given covers all subjects upon which examinations are held in any State.

The importance of the study of law as a part of a liberal education is just beginning to be appreciated. Both as a matter of general culture and of intellectual development, a full course in law will be found of greater real value than the ordinary course leading to the A. B. degree in the average American college. For the one who undertakes the study of law with this object in view, no course of study can surpass the one given by this University.

Only a few years ago the study of law was one which was supposed to be reserved for those who were fitting themselves to practice it as a profession. Such a view has been abandoned in recent years, and the value of the study of this important science for everyone is now recognized. To no class of the community, except perhaps our legislators, is a general knowl-

*See note page 26.

edge of the law more essential than to the *business man*. The old maxim that "an ounce of prevention is worth a pound of cure" holds better here than elsewhere. Few business men have time to complete the regular course of law such as is presented for the embryo lawyer, but the busiest one has the time to take a more or less extended course on the branches of particular interest to him, which will be his constant protector in all business matters.

All the law which a business man needs or would desire to know, is to be found in the Extension Course of the AMERICAN EXTENSION UNIVERSITY; while the Consultation Privileges granted to students cannot fail to prove of inestimable value to any person actively engaged in the business world.

The Dean and the Faculty, with their wide experience as lawyers, law teachers and law writers, and with their deep knowledge not only of the law, but also of history and political science and modern business needs and methods, have produced a course which is not simply a mechanical compilation of legal rules, but comprises also a deep and thorough treatment of the history, philosophy and science of the law, showing not only what the law is, but how and why it came to be so. This secures to the student not merely a few legal principles learned by rote and easily forgotten, but a clear insight into the spirit and meaning of the law, and lays a sound foundation upon which to build the structure of his later course.

REQUIREMENTS FOR DIPLOMA.—All students who have successfully completed the prescribed course of study, passing an examination upon each subject with an average standing of at least 75 per cent., and who have complied with all other requirements of the University, are entitled to a Diploma certifying to the completion of the regular law course.

DEGREE OF BACHELOR OF LAWS.—The conditions on which the degree of Bachelor of Laws, (LL.B.) is given, are as follows: The successful completion of the course of instruction, including all lectures and selected cases furnished by the University; the passing of a satisfactory examination upon the same; the passing of a satisfactory examination upon the statutes of the applicant's state; the production of a satisfactory thesis of at least three thousand words upon some designated legal subject, or the passing of the bar examination of some State.

EXAMINATIONS.—Current examinations are given at the completion of the prescribed work for each month. Final examinations are required to be taken before a proper officer, or an authorized representative of the University. The examination may be waived in cases where the applicant has successfully passed the bar examination in some State.

UNIVERSITY EXTENSION TEACHING

The extension of college and university instruction beyond the walls of the class room, to those who for business, financial or other reasons are unable to study in residence, has become the established policy of the leading institutions for higher education in this country.

Extension teaching, as developed in recent years, is carried on by three different methods: First, by correspondence; second, by class study, taken up by a club specially organized for this purpose; and third, by lecture courses of short periods. All of these methods have been profitably employed in the study of law.

The first of these,—the correspondence method,—is the one most highly endorsed and most extensively used. There are several reasons for this and among others the following may be noted: The student whose time for study is very limited, or because his occupation is irregular, loses no time traveling back and forth to class or lecture room in the performance of his school exercises.

The good results of studying law by himself are marked. The student learns how to find the law for himself, and this ability to find the law is of as much advantage as to know the law. The correspondence student does not depend so much on being told, for he has learned to depend on himself.

Each receives the personal attention of capable teachers and his progress is in no way influenced by the progress of any other student. The lessons go directly to the home of the student and he can take his own time in their preparation. He is not hurried over his work to keep pace with unusually bright students who are in advance of him; nor retarded by dull students who would continually keep the class back. What one man may grasp in ten minutes may require an hour's careful thought for another.

(Extract from *The American Law School Review*, May-June, 1908, page 166.)

THE VALUE OF CORRESPONDENCE INSTRUCTION IN THE LAW

BY GRIFFITH OGDEN ELLIS

The pioneers in any movement must expect doubt and even opposition, for there seems to be a natural prejudice against anything new, especially in methods of education, even in America, a country famous as a worshipper of the god of all things new. Therefore, those who started correspondence instruction and regularly organized institutions for the practice of this method of instruction realized that it would be hailed, if not opposed, as a new feature in educational methods, which must overcome prejudices even of those who should have been its friends and supporters. As the prejudice was only natural, however, perhaps no one has any right to find fault with it.

Before going further, I want it understood that in referring to resident schools in this article in no case do I do so in the spirit of criticism, or even of invidious comparison. In measuring the value of anything, we must have some standard from which to measure, and I regard and here use the resident schools simply as the gold standard in methods of legal education.

In this article I hold no brief for any particular correspondence school. I speak simply on behalf of the correspondence system of instruction itself. In spite of opposition and prejudice, it has gone steadily on advancing in popular esteem since the first Correspondence School of Law was founded, eighteen years ago. It is true that this movement, like all new movements and all reforms, has to a certain extent suffered by reason of its devotees as well as at the hands of its opponents. Any sincere and conscientious advocate of the correspondence method must admit that it has its weak points and its defects; but the same thing might with all propriety be admitted for the resident law schools—in all justice must be so admitted. Certainly no one would claim that correspondence law schools are better than the best resident schools, for that would be not only untrue, but foolish. However, admitting the weaknesses, or defects, or deficiencies, properly attributable to it, the correspondence method of instruction has features of immense value to

the public at large, and institutions giving correspondence instruction have their place—not as rivals of the resident schools and universities, not necessarily as institutions in the same class, but as institutions that serve that greater body of earnest and ambitious men and women who want to learn, who want to educate themselves, who want to improve their condition and prospects in life, but whose circumstances do not permit them to attend a resident school. As a matter of fact, I am sure that our own school has created for the resident law colleges vastly more students than it has taken away from them, and the same is true of all other good law correspondence schools.

We have many students who take up the study of law with no idea of practicing it as a profession, but who have an idea that they would like to study law and improve their minds and add to their education, and which study they can pursue in no other way than through a correspondence school. They become interested in the study of law, and some wish to go to a resident school, and circumstances often so change that these students can and do take advantage of the opportunity. A correspondence law school that is conscientiously and sincerely conducted will always recommend that its students go to resident schools if they can; for it must be recognized that the resident law schools offer many advantages that correspondence schools cannot give. The atmosphere of the classroom, the association with students pursuing the same line of work, and to a more or less extent with the professors also, has a tendency to produce the best results in an earnest student in a resident school. On the other hand, so far as mere thoroughness is concerned, a correspondence school need yield nothing to the resident school, provided the school is earnestly and sincerely conducted, and the student himself earnestly and sincerely desires to learn and will do his part as a student. This is proved by the results attained by the graduates of correspondence schools at State Bar Examinations, and, for that matter, in the practice of the profession. That fact, however, is quite as much a tribute to the student as to the correspondence school, if not more so; for no man can go through a correspondence course unless he earnestly desires to learn, and when he does go through such a course, and completes it, it is certain that he has learned at least as large a percentage of the subjects covered as has the average graduate of the resident law school pursuing the same course. The resident schools, of course, offer the fullest oppor-

tunities for learning, if the student attending will do his part in them. As an instructor, I think I may claim the correspondence school can offer equal advantages, though in making that statement I admit I hold some mental reservations, and in no statement in this article do I speak merely from theory, because I have had experience as a student in two of the best university law schools, and also fifteen years' experience in correspondence instruction since admission to the bar. I repeat, therefore, that while the correspondence school should not and does not seek to take the place of the resident school, it has an important place all its own. It should not be regarded by the resident law schools as a rival, nor should it be opposed by them. They should encourage it, if their faculties are, in the broadest sense, public educators, instead of simply ambitious advocates of their own institution and of their own method. Knowing all of the advantages and values of the resident school, having seen them and participated in them as a student, and knowing the advantages and values on the one hand, and, on the other the weakness and deficiencies of the correspondence school; having seen them and taken part in them as an instructor, I think I may claim for the correspondence school, in the field that it seeks to occupy and does occupy, a position of the very highest service and value to the public. For our own school, as an institution, I ask neither consideration nor favors, for as an educational factor I am acquainted with the results of its work and know it to be entitled to the highest consideration on behalf of its students and in their interests, and I am sure the same may be said of several other correspondence institutions.

The main point is that the Correspondence Schools of Law have their place, and were in fact brought into existence by the necessities of a large body of students, who were, in the nature of things, entitled to as much in the way of opportunities as any one else, but to whom circumstances closed the doors of the resident schools and universities. The correspondence method of instruction, therefore, has its place, and during the last eighteen years it has conclusively proved its value to the public. So far as individual schools are concerned, I speak not for them—neither for the one with which I am connected, nor any other. I recognize the method, however, give it the credit that is due it, and let the individual schools stand or fall by their own merits. With all institutions it should be, and ultimately is, simply a case of the survival of the fittest.

The students whom the correspondence schools serve are, in the vast majority, not very young men, but men who have been out in the world long enough to have realized from their business experience the value, yea, the necessity, of education, and by those experiences to develop ambitions, many of them for the practice of law, but ambitions which the circumstances in which they are placed make it impossible for them to gratify through the means offered by resident schools. Either for family or other reasons, they cannot afford to give up their businesses or their incomes to attend a resident school. They must, therefore, either give up their ambitions or study by some other method. For them, at least, the correspondence school offers the best opportunity that is obtainable. It offers them substantially the same course as does the resident school. It may not offer them all the benefits or opportunities or advantages that the resident school does, but it at least offers them the opportunity to receive the same information that they would get in a resident school, and to obtain it according to their own time and opportunity for study, and by a method which, if conscientiously practiced by the school and earnestly carried out by the student, is, for the purposes of thoroughness, nearly ideal. In this connection the following letter written by one student, Rev. Harry White, of Natick, Mass., a graduate of Harvard and a man whose education and experience are such as to qualify him to form a correct judgment, may be of interest. It is about as clear a statement of the merits of the correspondence method as could be offered, and is certainly a high commendation of the work being done by the school in which he was enrolled as a student.

"Dear Sirs: Being a graduate of Harvard, I shared in the prejudice which many college men have against the correspondence schools; and, desiring some knowledge of the law, I took the work up with you with considerable misgiving. I am glad to be able to say I have been most agreeably surprised by the character of the work done in Correspondence Schools of Law.

"In comparing correspondence schools with resident schools and colleges, we are constantly unfair to the former on account of the prestige which is enjoyed by the latter. Any man looking back at the facts of his university days will see that, although a great many scholars were on the teaching force, it was exceptional that the great scholar was also the great teacher. While there are some obvious advantages in favor of the resident study at a university, there are also some decided advantages in favor of the correspondence school. Take the facts about lectures. If the student listens attentively to the lectures without taking notes, he soon forgets them. If he takes notes, his attention is divided, and he misses a part of the lecture. If the instructor happens to be dull and prosy, the student is at a still greater disadvantage. If the air is bad, or he chances to feel tired or ill at the time of the lecture, he misses still more of its substance. With the correspondence school, the student does not labor under these disadvantages. The instruction being printed or written, the stu-

dent is able to get everything. If he does not understand, he can read it over again. If he is still unable to understand, he can have it explained for him, without making himself conspicuous, or annoying the lecturer by an interruption. He is able to control his own rate of progress and to go as rapidly or as slowly as he chooses. He is not hampered by the dull students nor hurried by the bright ones.

"Your lesson papers seem to be constructed on the soundest pedagogical basis. There is the supplementary matter which illustrates or explains the matter of the text-book and the questions by which the student may test his knowledge of the text.

"Your lectures cover the subject in a way which enables the student to grasp the subject he is studying as a whole, into which he can fit the different subordinate principles, so that it all lies in his mind as a systematized unit, rather than a mass of separate and unrelated facts and details which must be retained by sheer force of memory.

"But, however, much praise may be due to the lesson papers and lectures, I think that the most effective part of your instruction is that in the Test Questions and Practice Department. It is everybody's experience that we learn best by doing things. We learn to walk by putting the principles of walking into practice, and we learn to swim in the same fashion, and the student of law learns law best by putting the legal principles, as he studies them, into practice, by working out just such Test Questions as you furnish him, and by doing such work as is prescribed in the Practice Department. He will make mistakes, of course, but there is just as much learned—if not, indeed, more—in making mistakes and being corrected, as there is in not making mistakes.

"If you will pardon this somewhat lengthy letter (which you may print, if you care to, for this work seems to me to be so desirable, not only to a man who desires to be a lawyer, but to every man who is a citizen, that I should like to have it taken up more universally), I should say that your catalogue does not fairly or adequately represent the merits of your work. Your school does suffer from two limitations, it is true. It cannot supply a student with brains and it cannot make him work. But, if he has the average amount of intelligence and the average capacity for work, he can learn law with your system of instruction. He can learn law thoroughly, and with a great deal of pleasure in the learning."

One of our students, a university graduate, who was finally able to return to the law school of his own university and graduate therefrom, wrote us:

"In some respects I think your method is superior to university classroom work for man preparing for the bar examination."

Both these men are qualified to form opinions that are entitled to consideration, for they are men of high education, having had considerable experience with both methods of study.

OPINION OF THE LATE WM. R. HARPER,

PRESIDENT OF CHICAGO UNIVERSITY

Along the same line, the late Dr. William R. Harper, while President of the Chicago University, a short time before his death, in a public address said:

"In some respects there is opportunity for better work in correspondence study than in the ordinary class-room recitation. Each student in a correspondence course has to recite on all the lessons, while in many a class-room the student recites on only about one-thirtieth of the work of a three months'

course. It is safe to say that the standard of work done in correspondence courses is fully equal to that of the work done in the large class. Indeed, I may say that there is a larger proportion of high-grade work done by correspondence than in class recitation. People who take work by correspondence do it because they want to get something out of it, while in many courses in colleges the students take the work because it is required in the curriculum."

Further, drawing his illustrations from the teaching by correspondence in Hebrew and other dead languages, President Harper said:

"The work done by correspondence is even better than that done in the class-room. The correspondence student does all the work himself. He does twenty times as much reciting as he would in a class where there were twenty people. He works out the difficulties himself and the results stay with him."

In another address Dr. Harper is said to have stated that the students who took the freshman and sophomore work of his university by correspondence and came to Chicago to enter the junior class, were more thoroughly prepared than were those who took the freshman and sophomore work in resident attendance. Whether the foregoing statement is absolutely correct I cannot say; but I can very well believe, from my experience, that the statement in the form given is absolutely true.

CORRESPONDENCE SCHOOL STUDENTS EXCEL IN BAR EXAMINATIONS

Admitting that the correspondence method of instruction is good in some ways, the question may be raised: Can the law be successfully taught by correspondence? Seventeen or eighteen years ago the asking of such a question might have been justified. Today, however, that is not the case, for the reason that the experience of the various Correspondence Law Schools and of thousands of students who have studied in these schools has conclusively proved that the law can be successfully taught by correspondence, as is proved by the fact that those same students have taken the State Bar Examinations and have succeeded—passing them almost without exception. After all is said and done, it is results that count. It was stated in a magazine article some time ago that 25 per cent of the graduates of the resident law schools fail on the bar examinations, and that 60 per cent of the law office students fail on bar examinations. The records of the leading Correspondence Law Schools show that less than 1 per cent of the graduates of these schools who take the bar examinations fail to pass. While I do not mean to claim by this statement any superiority for the Correspondence Law Schools over the resident schools, for in both cases

the result depends largely on the student, the above record is at least a high tribute to the students of the correspondence schools, to their earnestness, their persistence, and their ability, and it proves conclusively that a man can learn the law by correspondence and that he can learn it thoroughly and well.

As has been stated, a man cannot go through a correspondence course in law except he wants to learn. Study by correspondence is harder than at the resident schools, for it has none of the adventitious attractions that university life offers, and no one takes a correspondence course merely because father can afford it and it is a nice way to spend a few years, which is the spirit with which so many boys go to college.

Results are what should be sought, and that, if a man has learned the law and knows it, he is entitled to the fullest consideration, opportunity, and respect, and that neither courts nor schools should throw in his way rules or requirements or obstacles that can be overcome only by circumstances and opportunities, and against which brains and knowledge alone are of no avail. The question, it seems to me, therefore, should be, in all bar examinations and in all tests: What and how much do you know? not in any sense, where or how did you learn it?

(From *Blackstone's Commentaries*, 1 Black. 5.)

WHAT BLACKSTONE SAYS ABOUT A KNOWLEDGE OF LAW

For I think it is an undeniable position, that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of every gentleman and scholar, an highly useful—I had almost said essential part of liberal and polite education. And in this I am warranted by the example of ancient Rome, where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium* or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

And, first to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land which is governed by this system of laws. A land, perhaps, the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, con-

sists in the power of doing whatever the laws permit, which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least with which he is immediately concerned, lest he incur the censure as well as inconvenience of living in society without knowing the obligation which it lays him under. And this much may suffice for persons of inferior condition who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure cannot be so easily excused. These advantages are given them not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life discharge properly their duty either to public or themselves without some degree of knowledge in the laws.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations and sometimes to dispose of the lives of their fellow-subjects by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite, especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity even of our best juries to do this with any tolerable propriety has greatly debased their authority and has unavoidably thrown more power in the hands of judges to direct, control and even reverse verdicts than perhaps the constitution intended.

(The Saturday Evening Post, July 25, 1908.)

BOUND FOR THE TOP

In the nature of every civilized man there is an instinct of progressiveness—a desire to excel in some particular. It is found, in some degree, in the most inefficient as well as the most energetic of men. If the opportunity for its outlet does not occur in his work, it will display itself in his recreation—even in his dissipation. It appears in the ditch-digger and in the

accountant, in the mill operative and in the skilled mechanic. It may exhibit itself in the breeding of a few hens, the improvement of a bull terrier's progeny, or in the raising of the earliest peas, or the biggest squash in a suburban lot. It may turn to the building of a motor boat or sail boat; to experimental recreations in mechanical, electrical or chemical affairs; to studies in literature or art. All these may be recreations and relaxations entirely foreign to the man's daily occupation, and yet it is quite possible to find in them the fighting chance for greatly improved conditions.

Van Depoele, a cabinet maker of Detroit, Michigan, took up the study of electricity for evening amusement, and he became the inventor of the overhead trolley system and a highly successful constructor of electric street railways. One of the largest truck farmers of Marblehead, Mass., developed from a dry goods clerk who used to cultivate a few vegetables in a small suburban lot.

Corliss, the inventor of the noted cut-off valve system for steam engines, made his experiments after working twelve hours a day as a meat-cutter. Nathaniel Hawthorne attained his splendid height in literature while working in the custom house.

Turner, one of the greatest of English painters, gained some measure of renown while earning his living as a barber.

William Herschel, afterward knighted for his attainments as an astronomer, built his famous instruments and astounded the scientists of the day by his discoveries while earning his living as a violinist at concerts and dances.

The whole point is that, while the chance of promotion for the mechanic, the clerk, the employe of any sort, may occur at any moment and should find him ready, other chances may, and frequently do, occur outside of any actual advancement in his particular occupation. But it is absolutely certain that unless he is ready for them, they will, in either case, mean nothing to him, nor will he often see them. If he has not a few dollars ahead the better job, a hundred miles away, or the good bargain in a little real estate, or the chance to develop some bright little business idea, appeals in vain. If he has not acquired sound confidence in himself and some assertiveness of his own knowledge, he will not be called upon to take charge when his chief or foreman is away sick or on a vacation. If he permits his recreations to absorb his energies in matters which return him nothing

—either in useful knowledge or good hard dollars, he may easily reach middle age with a reputation as a “rattling good fellow” but without the power to raise a hundred dollars for the most urgent necessity or the most promising of chances.

This getting ready and keeping ready gives a man strength, self-confidence and a cheery outlook. It easily lifts him out of the waiting class because he feels that he is not bound to his job; that, although favor or preferment is a mighty good thing, if it comes his way, he is not dependent upon any one man or firm for his fighting chance.

(Extract from Chicago daily papers.)

MORE NEED OF TRAINING

The necessity for thorough preliminary training for success in the modern business world was emphasized by the Rev. Alexander J. Burrowes, President of St. Ignatius College, in an address last night to the graduates of the commercial course of St. Ignatius High School.

“There has been a great change in the business world of recent years,” he said. “As much brains, as much special training, is demanded of the business man today as of the professional man. The modern business man does not confine his activities to sitting behind a counter and waiting for people to sell goods to him and buy them from him. He is active and aggressive and he creates and meets great problems which demand wide knowledge and a trained mind.

“I believe the numerous cases of breakdown by business men under the strain of modern life is due to their insufficient mental foundation. Their minds are not fitted to carry the strain put upon them by the complexity of modern industrial life.”

(Extract from *The Saturday Evening Post*, June 13, 1908.)

THOMAS F. RYAN, HIS PERSONALITY AND POINT OF VIEW

BY ISAAC F. MAXOSSON.

Yet when I asked him if he had ever laid down any definite business rule to follow, he said:

“No, I never have followed any rule. I’ve simply worked hard and kept at it. My experience has led me to believe that

in this country men are judged not so much by what they are as by what they do. Therefore, satisfaction comes from doing things.

"I have always found it a good plan, however, to master the details of an enterprise before moving. I like to take hold and build up. It is good to lead forlorn hopes. But when I have finished a work it ceases to have interest for me. I prefer to look forward rather than backward; I'd rather speak of what I have accomplished than discuss what I am going to do."

I asked him to indicate the qualities which in his opinion most make for a young man's success these days. Mr. Ryan said: "Industry, sobriety and concentration."

And right here may be repeated a little incident which throws light on Mr. Ryan's methods. He is a director in many corporations, and is the type of director who directs. As a result, he has often surprised lawyers with his knowledge of law. Several years ago one of his sons found a worn set of Chitty's Blackstone in the attic. Taking it downstairs, he said: "Father, whose books are these?"

Mr. Ryan picked them up fondly, and said: "I bought those books when I was starting out in business as a boy. I thought that, in order to succeed, I'd have to know law, so I studied Blackstone at night."

LAW IN GOVERNMENT SERVICE

One of the most encouraging features with respect to legal education in the District of Columbia, is the remarkable change in the sentiment which existed some years ago among the government officials with regard to the desirability of having the civil employes of the government take up the study of law while in the government service. There has been a change of front in this particular, and the recognition which is being given in the government departments to those who hold degrees in law has had a very marked effect upon the increased registration of the law schools in Washington.—Exchange.

(Reprinted from *Chicago Tribune*, August 16, 1908.)

From sketch of Frank H. Hitchcock, chairman Republican National Committee.

STUDIED LAW IN EVENING

"My new work satisfied me, and so did my surroundings. I

made the acquaintance of Mr. Justice Harlan of the Supreme Court, told him what I meant to do, and he invited me to attend one of his lectures on constitutional law at George Washington University. I heard him and that led me to study law, going to classes in the evening and paying my own way as I went along."

(Extract from *Law Magazine*.)

LAW IN BUSINESS AFFAIRS

The advantage of an education in law is apparent to anyone who has observed the management and guidance of the largest enterprises in the country. Inspection of the directorates of large corporations shows one or more men well skilled in the law, in their membership. These men determine and direct the business affairs of the corporations, and avoid the dangers and expenses of much litigation.

This is specially noticeable in the case of the United States Steel Corporation, which is possibly the largest private corporation in the United States. The Chairman of the Board of Directors of that company, Hon. E. H. Gary, distinguished as a lawyer and a jurist, has managed its affairs with less friction to the Government, the State, the public and its employes, than any other corporation approaching it in magnitude, in the United States. Judge Gary, being a lawyer, appreciated the advantages of his company doing business along legal lines, and it is not only one of the best managed corporations, but one of the most profitable.

What is good in principle for this concern, should apply to others. Every business man should acquaint himself along these lines, that he may conduct his business without friction, avoid the expense of litigation, and devote all of his energies to production and distribution.

(From *The Prudential*.)

Foresight is where we are able to blunder into success without looking surprised.—Puck.

But, pray, Mr. Puck, when do we ever "blunder into success", Never! The thing is impossible. There can be no success unless one works for it. Did Napoleon "blunder into success"? Did Washington or Franklin or Jefferson or Jackson or Lincoln or Grant or any one else of our highly successful

Americans in the arts of war or peace "blunder into success"? No, no; every one of them achieved success by assiduous devotion to the genius of hard work. So it was with our own great Prudential. Here there was no blundering, no tumbling into good fortune. Success came—wonderful, marvelous, unparalleled success—because the price demanded was paid; hard, everlasting work.

And so it is with every successful man in our service. In no case did he ever "blunder into success." In every case, from the year 1875 to this year of most glorious prospects and opportunities, this year of grace, 1909, the men who have succeeded have won their successes by getting "on the job" from the start and working it for all it was worth to them and to the company.

No, siree; you cannot "blunder into success." You can blunder into failure all right and easy, but into success—Never!

Note.—In order to avail oneself of the Guarantee mentioned on page 7, it is necessary that the student complete the regular Course in the prescribed two year term and take the bar examination at the first regular examination after completing the Course, or after the expiration of the term of study required by the statutes of the state chosen, in case such state has a statute requirement as to term of study.

AMERICAN EXTENSION UNIVERSITY
(NON-RESIDENT INSTRUCTION.)
CHARTERED UNDER THE LAWS OF CALIFORNIA
LOS ANGELES

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LESSON I.—

TITLE I.—LEGAL OUTLINES.

TITLE II.—HISTORY OF THE LAW.

BY C. H. SAYLES, LL.B.

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EXTENSION LAW COURSE

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LESSON I.—

TITLE I. —LEGAL OUTLINES.

TITLE II.—HISTORY OF LAW.

BY C. H. SAYLES, LL.B.

TITLE I.—LEGAL OUTLINES

CHAPTER I

ELEMENTARY PRINCIPLES.

- §1. Law in General.
2. Definition.
3. Purpose of Law.
4. The Rule of Precedent.
5. Foundations of Law.
6. Legal Rights and Duties.
7. Wrongs—Public and Private.

§1. LAW IN GENERAL.—All things, material and spiritual, animate and inanimate, within the realm of human knowledge, observation, experience and endeavor, are subject to law. The foundation of social order, the evolution of public and private rights, and the basic factor of all human progress, is *law*.

Law in the general sense, is simply a rule of action. That action may be that of nature, or of man. The law of nature is the basis of many sciences.

Law, as formulated by man, is a purely technical term, with which alone these lectures deal. As a governing instrumentality in human affairs it is a science which concerns and affects all mankind.

§2. DEFINITION.—In its technical and most common use, the term “law” has been defined as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”¹ Bouvier’s Law Dictionary defines the laws of a Commonwealth to be “those rules and principles of conduct which the governing power in a com-

¹Blackstone Comm., 14.

munity recognizes as the rules and principles which it will enforce or sanction, and according to which it will regulate, limit or protect the conduct of its members." The Supreme Court of the United States has defined the laws of a State thus: "The rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws."²

§3. PURPOSE OF LAW.—The purpose of law is the promotion of private and public welfare and the protection of established rights. Progress requires sound rules of conduct—rules that are protective of existing rights, or remedial or punitive in cases where they are disregarded and infringed. The only theory which justifies legislation, and all forms of governmental control, is the general good of the community thereby affected. The United States Supreme Court, on this question, has well said: "All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society."³

§4. THE RULE OF PRECEDENT.—What is known as the Rule of Precedent—sometimes called "*Stare Decisis*"—is of prime importance in the study and practice of law. This rule may be defined as that requirement compelling the following of established legal doctrine or decisions in like cases. That is to say, where the courts, upon a given state of facts, and upon sound legal reason, have come to a conclusion of law and decided accordingly, that decision makes, and is, the law of the realm subject to the jurisdiction of such courts, for all time thereafter, on the point or points involved in such case, unless, and until, it is reversed by a higher court, or is abrogated by legislative action. The decisions of the highest court having jurisdiction are the true precedents, and the rule of precedent requires that these decisions be followed in subsequent cases involving like issues.

A rule of law so established cannot be disregarded merely because the courts come to consider it unjust,⁴ or inconvenient.⁵ The proper remedy in such cases is legislative, not judicial. A precedent, if flatly absurd or unjust, may be disregarded, and must be if set aside by legislation.

²Swift vs. Tyson, 16 Peters, 18.

³Rector, etc., of Christ Church, vs. Philadelphia County, 24 Howard 302.

⁴Childress vs. Emory, 8 Wheaton 672.

⁵Ex parte Kearney, 7 Wheaton 45.

The great body of expressed law is not found in statutes or codes enacted by legislatures. It is that which is created by the final decisions of the courts, deduced from legal remedies applied in cases similar to the one at issue. Accordingly a condition of facts wholly dissimilar to any that has ever preceded it, cannot be governed by precedent—as there has been no preceding like case—but, itself, is a precedent for succeeding similar conditions.

§5. FOUNDATIONS OF LAW.—Law is based upon the existence of rights, duties, wrongs and remedies. For instance: primitive man, even, had rights, foremost of which, as with his most fully civilized descendent, was the right of life. Because of this right, a duty devolved upon others to respect it; a violation of that duty constituted a wrong, and that wrong required a remedy.

As a matter of fact, however, the method of law development thus suggested, is exactly the reverse of the process by which the law has historically evolved. At the outset there was—to continue the illustration—no declared and established rule recognizing the inviolability of human life, and providing redress or penalty for violence against it. The first incident in the formation of the law against homicide was the homicide itself; not the laying down of a rule forbidding it. After repeated takings of human life, the growing aversion thereto became crystallized into an unwritten, and later into a written, rule prohibiting it, accompanied by penalties for its violation. And thus with each particular of the existing law.⁶

§6. LEGAL RIGHTS AND DUTIES.—Certain legal rights are personal, such as the absolute rights of personal security, personal liberty and private property. Other rights are relative, as in relation to others, such as the rights and the duties existing between fellow citizens, as such, those between private citizens and public officers, and the relations between master and servant, husband and wife, parent and child, guardian and ward, and the like. Property rights, though they relate primarily to property, are none the less personal rights, centering in those having legal relation thereto.

Duties are the correlative of rights, and a definition of one necessarily makes clear the meaning and legal measure of the other.

⁶See "The Foundations of Legal Liability," Street, Vol. III., pp. 3-4.

§7. WRONGS—PUBLIC AND PRIVATE.—Public wrongs are those of such a character that they, in some degree, affect the public peace, order or health, even though the immediate victims thereof be private individuals. Such wrongs are termed crimes. For public wrongs the law provides only punishment to the offenders, except that, in some jurisdictions, in certain cases, where restitution is possible, it is prescribed, or allowed, as a part of the penalty.)

(Private wrongs are all wrongs perpetrated, willfully or negligently, by one person upon another, not amounting to crimes, and yet of sufficient gravity to require legal remedy.) These wrongs are termed torts. For private wrongs the law purports to provide redress against the perpetrator in the form of monetary damages, or of property restitution, or both.

CHAPTER II.

CLASSIFICATIONS OF THE LAW

- §8. Substantive and Adjective Law.
9. Municipal Law.
10. International Law.
11. Martial and Maritime Law.
12. Basis of American Law.
13. Varying Systems of Pleading.
14. Relative Importance of Written Laws.
15. Equity—Its Source and Jurisdiction.

§8. SUBSTANTIVE AND ADJECTIVE LAW.—All law is capable of classification into either Substantive or Adjective law.

(Substantive law embraces all provisions which relate to the rights and obligations of individuals between themselves, between individuals and the community at large, and of the wrongs which violate such rights and obligations.)

(Adjective law has to do solely with the rules of legal procedure and practice by which such rights and obligations are upheld and enforced, and such wrongs redressed and punished.)

The great body of the law is substantive, and it is this portion which is chiefly being added to constantly, as the science of jurisprudence progresses.

§9. MUNICIPAL LAW.—The term “municipal,” as thus used, refers to a state or nation, and not merely to its primal meaning of a city, town or other minor part of the body politic.

A reference to the chart hereto appended will aid the student in clearly discerning these classifications.

Municipal law is that body of rules prescribed by the governmental power, either by legislative act, or by recognition and enforcement. If by the former method, they are known as "written;" if by the latter, as "unwritten" laws. In either instance, however, they are equally obligatory. It is this department of law with which the practitioner is chiefly concerned, and to which Blackstone referred in giving his definition of law previously quoted.⁸

§10. INTERNATIONAL LAW.—Of no less importance, but perhaps less urgent in one's immediate needs in the study of elementary legal principles, is the law of nations, or international law. For our present purposes it is sufficient to say that it comprises the body of obligations due from one sovereignty, or the citizens thereof, to another sovereignty, or its citizens, and that it is either public or private. The subject in general, and as to its subdivisions, will be fully treated in due course, hereafter.

§11. MARTIAL AND MARITIME LAWS.—The nature and scope of these divisions of the law is clearly indicated by their names. (The former is that system of rules dominant and enforceable,—in this country,—only in time of war, or of other great public calamity or peril, when the municipal law is suspended at the seat, or in the immediate vicinity, of military operations.) With the passing of the occasion for military supremacy, martial law must yield to the civil, or municipal law.

Maritime law relates solely to commerce on navigable waters, to navigation of vessels, their rights and restrictions, and those of the seamen thereon, to persons and property in transportation thereby, and to all marine affairs. The United States courts have, by constitutional provision, exclusive jurisdiction over all admiralty, or maritime matters.

§12. CHIEF BASIS OF AMERICAN LAW.—The principal basis of the law of all the States in this country, except Louisiana, whose judicial system is founded upon the Roman law, as modified by the Code Napoleon, is the Common Law of England. Most of the States have provided that the law of England, common and statute, up to, at least, the fourth year of James I.,

⁸For a full explanation and interpretation of municipal law, see 1

Blackstone Comm., 44-46.

shall, with certain specified exceptions, be accepted as the basis of the law of such States.⁹

The United States, as such, has no common law. The only Federal law is the United States Constitution and its statutes and treaties.

§13. VARYING SYSTEMS OF PLEADING.—The States having, as stated, adopted the English substantive common law, accepted also its common law system of pleading and practice,—that is to say, its adjective law. This system was cumbersome, burdened with a multitude of formalities and unreasonable technicalities, and was soon found to be unsuited to modern business interests. A few States, however, still retain that system almost in its entirety,¹⁰ but in far the larger number legal procedure has been radically modified.

Several Commonwealths have adopted what are called Practice Acts, abrogating the most serious objections to the common law system, while retaining other salient features.¹¹ Nearly one-half of the total number, though, have wholly abolished the old method, and established the code system, under which, in concise terms, rules are laid down for the guidance of court, litigants and lawyers, and compelling directness, exactitude and simplicity in legal practice.¹² Certain of those which have thus come to be known as code States have amplified the code system of government so that it controls, not merely the course of legal procedure, but covers, in its several departments, practically all the social, civil, and political relations of the citizenship and of the State.

✕ §14. RELATIVE IMPORTANCE OF WRITTEN LAWS.—The relative importance of the written laws in the United States is as

⁹At the time of the Revolution, the people of the colonies, being chiefly emigrants from England, knew no laws other than those they had brought with them from their fatherland. Upon attaining their independence they naturally adopted the body of this familiar law as the basis of their own independent jurisprudence, so far as it was applicable to their new social and national condition. Accordingly such portions of the English law, statute and common, with the exception noted, in force prior to the Revolution, became the common law of this country.

¹⁰Common law States: Florida, Ill-

inois, New Hampshire, New Jersey, Rhode Island.

¹¹Practice act States: Alabama, Arkansas, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Mexico, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia.

¹²Code States: Alaska, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Kentucky, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming.

follows: (1) Constitution of the United States; (2) treaties and laws made in conformity therewith; (3) State constitutions; (4) State statutes; (5) municipal ordinances.

(The United States Constitution, and the Federal statutes and treaties, are the supreme law of the land and must be upheld in every State, Territory and Province of the Union.) The laws of the individual States and other subdivisions of the country are enforceable only within their respective boundaries, with certain exceptions to be noted under the head of Private International law. Municipal ordinances must always give precedence to national and State laws, if in conflict therewith, and are of effect only within the limits of the municipality which enacted them.

✕ §15. EQUITY—ITS SOURCE AND JURISDICTION.—Out of the inadequacies, rigors, unyielding technicalities, and consequent injustices of the English common law, arose the English system of equity jurisprudence, to do justice, and compel right and conscionable dealing between litigants.¹³ Its province is to give relief where the remedies of the common law fail or are inadequate. But for its administration, many wrongs would go unredressed, and many rights unvindicated. Its appeal is to conscience—to that which is morally right—rather than, as at law, to that which is legally obligatory. For example, the law will hold one to a deed executed by him, even though its execution was procured by fraud; but a court of equity will set it aside. Again, the law affords no escape from the contract of marriage, but equity, for prescribed reasons, will break off the legal bands.¹⁴

The English equity system, acquired by the States adopting the English common law, has, like its fellow, been materially altered, in most jurisdictions, so as to conform it, in practice, to present-day conditions. Its history, development and modern method of application will be fully presented in due course.

¹³Reeves, in the second volume of his History of the English Law, pp. 466, 600, gives an excellent account of the rise and growth of equity jurisprudence, and there points out that it originated in the reign of William the Conqueror, was substantially broadened in the days of Richard II., but that it was not until the time of

Henry VI. that equity decisions were reported.

✕ ¹⁴The principal subjects within the jurisdiction of equity are accident, account, foreclosure of mortgages, interpleader, injunction, partition of joint estates, specific performance of contracts, and trusts and trustees.

CHAPTER III.

WHERE TO FIND THE LAW

§16. In General.

17. "Written Law."

18. "Unwritten," or "Judicial" Law.

§16. IN GENERAL.—Law is the product of evolution. In studying it consideration must constantly be given to the advanced and advancing condition of the world today, over that which existed when certain laws under consideration were enacted, or certain decisions were rendered. Given a certain statement of facts, the searcher for the law governing same naturally will not expect to find legislative or judicial action pertinent thereto at a date when the stated conditions would have been impossible. However, law upon similar conditions of fact, dissimilar in incident though the latter may be, is often of great value.

§17. "WRITTEN LAW."—The most apparent, and accordingly that which we may, for convenience here, take as the first source of legal information,—and to the authority of which, while they are in force, all legal rules emanating from all other sources must conform,—are, as has already been intimated, the constitution and treaties of the United States, the constitutions of the respective States, and all acts of the legislative departments of State and Nation enacted in conformity therewith.

§18. "UNWRITTEN," OR "JUDICIAL" LAW.—However, because all legislative enactments, and even constitutions themselves, are expressions merely of the then will of those thereby governed, which expressions may at any time, in due course, be materially changed, and even entirely abolished by those who created them, they are, in the acquirement of true legal learning, subsidiary to the mastery of those rules of legal reasoning and interpretation, without which constitutions, statutes and codes would be dormant and forceless, or the instruments of erratic tyranny.

These rules of legal reason—the supremely important part of the law-student's study, and of the skilled practitioner's equipment—are to be found primarily in the reported decisions of the courts of England and America, and, secondarily, summarized therefrom in legal text-books, the judicial discussions of legal publicists, the formulated and systematized courses of law schools, and the like.

This portion of our jurisprudence constitutes the large bulk of applied law, whereby the principles involved in written enactments, and the unwritten principles of the common law, are fitted to the varied and varying conditions of individual and communal life, and is sometimes called "judicial law" to distinguish it from the enacted, or "written" law. Technically speaking, therefore, judicial law is "unwritten" law.¹⁵

TITLE II.

HISTORY OF THE LAW

CHAPTER I.

ORIGIN OF THE LAW

§19. Value of Legal History and Theory.

20. Earlier Forms of Law—Its Development.

21. Earlier Governmental Forms—Development.

§19. VALUE OF LEGAL HISTORY AND THEORY.—Whoever aspires to pre-eminence in the legal profession, must have a thorough knowledge of the doctrines, principles and rules of law as a classified and orderly whole, exhibiting the law, thus, in its true light as a science. To be a thoroughly accomplished lawyer, the student must explore far beyond the law's immediate boundary lines, and ascertain its origin, follow its development, and note the function it has at various epochs filled in human affairs. This study is rightly termed the philosophy of the law. Some practitioners delight to criticise such study as being without practical value, and declare it to be wholly academic. Those, however, who have stood, and who today stand, at the head of the profession, enriching and adorning it, as well as being its recognized most efficient ministers, are those who have gone deepest into the history of its causes, changes, administrators, theorists, and preservers. The student is therefore urged to extend his historical studies of the law far beyond what it is practicable for these lectures to carry him.

¹⁵The decisions of the courts of appellate jurisdiction, Federal and State, are published in book form at regular intervals, and constitute an important

part of every law library. Complete information as to same and their service in study and in practice will be given later in the course.

§20. EARLIER FORMS OF LAW—ITS DEVELOPMENT.—Law antedates written history and its origin is accordingly obscure. (Among primitive peoples the law at first evidently derived its force from the right of might alone, and later from custom thereby created.) It soon became apparent that the proper regulation of family, communities and other groupings forming the social order, required fixed and recognized rules of conduct to avert personal rapacity and general disorder. Thus were developed laws governing the domestic relations, fixing title and possession to personal property, giving retribution for crimes and recompense for torts. Subsequently when the wandering families and tribes began to settle in permanent locations, rights of real property were established, and those affecting barter, sale, loaning, and like early transactions of a commercial nature were gradually evolved.

§21. EARLY GOVERNMENTAL FORMS—DEVELOPMENT.—The primal forms of government were based upon the family relation as their type. The authority of the father over the individual members of the family and over their blended or common interests, grew into the dominance of the patriarch or chieftain over the tribe. Thence into the superior authority of a group of chieftains, and, by due expansion, into those forms of supreme communal command, ranging from the barbaric to the most highly advanced systems of the most cultured epochs, and the completest of codes.

CHAPTER II.

BABYLONIAN LAW

§22. Most Ancient Code—Chief Features.

§22. MOST ANCIENT CODE—CHIEF FEATURES.—The oldest known code of laws, and probably the most ancient code of importance, is that of Hammurabi (Khammurabi). The exact date of its establishment is uncertain, but it has been estimated as being the law of Babylon between the years 2000 and 3000 B. C. Babylonian jurisprudence, however, did not reach its perfection until a much later date, at the time of its overthrow by Persia.

(The adjective law of Babylon never attained the perfection of its substantive law.) (Law was administered chiefly by the

priests,) and its procedure consisted largely of long and formal oaths, rather than by relying upon direct evidence. Witnesses, to a certain extent, acted in the capacity of jurymen.

The family was the unit of government. Marriage was by purchase of the bride from her parents. It was the subject of contract; was accompanied by a complete adjustment of property rights; and usually contained provisions covering the basis of possible divorce.¹⁶ Married women, although regarded with great respect by their children, were virtually slaves of their husbands. Adoption and emancipation of children were provided for.

The law of property, real and personal, was well developed. (The methods of conveying and encumbering real estate were similar to those of the present day.) The party conveying always had the right of repurchasing the property sold, at the price he received for it, unless he expressly waived such right in the deed.) (Mortgages, pledges and other forms of security for money borrowed, were very common.) Wills were not known under this law, the gift of real property by the owner, with a reservation to himself of a life-interest therein, making such instruments unnecessary. (Personal property law was more highly advanced than under the early English common law.)

(Babylon, being a great commercial center, naturally had legal provisions of large scope and much nicety affecting contracts of all kinds, and the various transactions of commercial life.) Future as well as present transactions could be made the subjects of contract. (Agency, partnership, brokerage, and, in fact, much of the present-day commercial system was the subject of this law.)

Babylonian jurisprudence, or at least many of its most salient features, were appropriated and preserved by the conquering Persians, and by them diffused throughout a vast territory.

¹⁶A typical marriage and divorce contract is the following, taken from Lee's Historical Jurisprudence, Part I., Chap. 1:

"Remu, the son of Sanhatu, has taken in marriage Bastu, the daughter of the priestess Samas, Belisumu, the daughter of Ugibitu. ————— shekels of silver is her gift; since she (i. e., the mother), has received it, she is content. If Bastu says to Remu, her husband, "Thou art not my husband,"

then shall she be . . . and thrown into the water. If Remu says to Bastu, his wife, "Thou art not my wife," he will give her ten shekels of silver as her quit-money.

"Samas-rabi has put Naramtu away. She bears her ziku (?) and has received her quit-money. If Naramtu is married to another, Samas-rabi will not love her more." (Followed by oath, date and witnesses.)

CHAPTER III.

GRECIAN LAW

§23. Origin and Salient Features.

§23. ORIGIN AND SALIENT FEATURES.—The ancient Greeks, although not regarded as great law-makers, wisely accepted the principal property and commercial features of the Babylonian system, and the provisions of the maritime laws of the Phoenicians, and on this basis ultimately constructed an exact and effective jurisprudence.

The laws of Athens, as the most cultured and advanced province of the nation, became the most highly developed, and is taken as the type of Grecian law.

The adjective law of Greece—directly contrary to that of Babylon, its great progenitor—was far in advance of its substantive law. Legal procedure thereunder was quite similar to that of the common law courts of England later. The judge usually prepared a report of the case before him, which he submitted to the dicastery—a form of jury—who thereon decided the case by vote. The execution of judgments of the courts was, in most instances, left to the successful party. Indeed this method was followed under nearly all ancient systems.

The substantive law, aside from that taken from the Babylonian, was principally concerned with domestic relations, torts and crimes. In Sparta, marriage was accomplished by capture of the bride; in Athens, it was by purchase. Divorce was freely given the husband. The wife was without any legal rights of importance.

CHAPTER IV.

ROMAN LAW

§24. Greatest of Legal Systems.

25. Origin and Growth.

26. The Roman Codes.

27. Civil and Canon Laws.

§24. GREATEST OF LEGAL SYSTEMS.—The Roman law is the one system of jurisprudence which stands out in high prominence over all others. It survived the destruction of empires, as time passed its wisdom and strength was increasingly appreciated, and it has become the basis of the great legal systems

of two continents. No other judicial system is worthy of being placed by its side, with the possible exception of the English common law—itsself in large part founded thereon.

§25. ORIGIN AND GROWTH.—By the discovery of the Institutes of Gaius, in 1816, a complete view of the Roman legal system as it existed three centuries and a half before the time of Justinian—its great codifier—was obtained. We find therein the same elements and development, the same general family organization, and the same evolution therefrom of the state, as in earlier systems. But, while Rome passed through the same progressive stages as other nations, she advanced far beyond where they had stopped.

(Rome became a republic about 500 B. C.) For nearly two hundred years thereafter the plebians, or common people, were in constant contest with the patricians, or aristocracy, for political supremacy. (They finally obtained equal civil rights, and soon created a distinctly plebian assembly) About 450 B. C., ten men, known as the decemvirs, were elected to draw up a codification of the law. Ten tables were prepared the first year, and set up in the forum. The next year two more were added, thus constituting the Twelve Tables, famous as the first authentic compilation of Roman law, and regarded as the foundation of Roman jurisprudence up to the time of Justinian, 500 A. D.¹⁷

(After the fall of the Republic in the first century B. C., the sole power of law-making lay in the Emperor.) (Laws which owed their authority to him were called constitutiones.) The Emperor appointed certain leading lawyers, known as juris consults, whose decisions on legal questions were cited in court as authority upon disputed points of law. These decisions were termed *jus respondendi*. From the membership of the juris consults came the great law writers, Gaius, Scaevola, Paulus, Julianus, Papinian and others.

§26. THE ROMAN CODES.—Previous to the reign of Jus-

¹⁷These tables made provision for the government of Roman citizens mainly, as a consequence of which a department of law, created chiefly for the settlement of controversies between foreigners—and known as the *jus gentium*—was formed. According to the early Roman view, foreigners were denied equal privileges with

Roman citizens, hence the distinction in legal provisions applicable to each. Later this distinction was removed, but the principles of the *jus gentium* were retained and formed a controlling factor in later Roman law. So, too, it was part of the law which became the prime basis of modern legal systems.

tinian, the Roman laws had been reduced to the form of a code several times. The principal compilation of this kind was that under Theodosius II., in 435 A. D. This was supplanted in the following century by the Justinian Code, universally recognized as the most magnificent production of human reason, and the most potent legal system, ever framed.¹⁸ Upon the fall of the Roman Empire, the victorious Teutonic tribes adopted parts of these codes, particularly those portions applicable to real property.¹⁹

In the twelfth century the Roman law was fully taken as the basis of legal instruction in European law schools, and has ever since occupied supreme place in legal opinion, authority and study.

§27. CIVIL AND CANON LAWS.—The term "civil" as applied to the Roman law (the *jus civile Romanorum*) comprises all laws at any time in force among the Roman people. The term "civil law," however, in said connection, is accepted to mean only that adaptation of such law to meet the conditions of Roman life at the time of the reign of Justinian, and as included in his compilations thereof.

The Canon law was that portion of the Roman law, which by reason of the close alliance of church and state in later Roman history, governed ecclesiastical affairs. That is to say, it is that part of the Roman law accepted and administered by and in behalf of the Catholic Church.²⁰

¹⁸This code is formed of the following compilations: (1) "The Early Code," compiling the imperial constitutions. It is sometimes called the "Codex Vetus," and was finished in 529 A. D. (2) "The Pandects," or Digest, consisting of the codification of the entire civil law, other than the constitutions. This was issued in 533. (3) "The Institutes," also published in 533. This was really a textbook for the study of law, and founded largely upon the earlier works of Gaius. Although primarily a treatise, it was given the authority of enacted law. (4) "The New Code." This work was promulgated in 534, and was a revision of the Codex Ve-

tus, made necessary by the later constitutions of Justinian. (5) "The Novels." The numerous constitutions issued by Justinian after the publication of the Codex Vetus, and making many material changes in the law, led to a separate collection of them after his death, and these comprise the "Novellae Constitutiones," now usually called the "Novels."

¹⁹See generally on this topic chapter 44 of Gibbon's *Decline and Fall of the Roman Empire*.

²⁰The canon law was adopted in toto as a part of the English common law.

CHAPTER V.

ENGLISH COMMON LAW

§28. Derivation and Development.

29. Feudalism.

30. "Adjective Law."

§28. DERIVATION AND DEVELOPMENT.—The only independent system of unwritten law evolved by any nation of modern times is that of the English Common Law. (This system arises from immemorial custom and usage, having the force of law, by reason of judicial recognition and sanction.) It is based upon the crude laws of the ancient Britons, to which have been added from time to time, the broadening and varied rules, culture and customs of the Romans, Picts, Saxons, Danes, Normans and other virile peoples.

(The Jutes, Angles, and Saxons settled small portions of Britain,) subjecting the inhabitants to a more or less tyrannic control. The political institutions growing out of the mingling of these powerful tribes, were chiefly the rules and customs of their ancestors as affected by the Roman law, after the overthrow of the Roman empire, as already noted. In time England—or Angleland—became divided into three well-defined minor kingdoms, between which there was constant rivalry for supremacy, and, in addition, against them all, stood the original Britons seeking to regain control of their country.

(The kingdom of Kent was the first to become regulated by a definite system of law.) Alfred the Great mentions King Aethelberht of that kingdom as one of the great law-givers from whom he obtained many of the principles incorporated in his own legal work. Offa, placed on the throne of the Anglo-Saxon kingdom there, is another king whose laws were the foundation of Alfred's wise system. After his repulse of the Danes in 878, Alfred devoted the remainder of his life in establishing a sounder form of government, based on fixed, systematized laws. (His work in this particular was that of codifying the laws then in force in various sections of the kingdom, rather than in the making of wholly new law.)

In the tenth century the kingdom so strongly built up by Alfred was overthrown by the Normans, the then most civilized of European nations. (With the exception of the introduction into England of the Norman feudal system, very few innovations in English law were made by William the Conqueror.) The changes that thereafter took place were made gradually, and

only in rarely exceptional cases was there any radical reform in the main body of the law.

In the early part of the eleventh century,—and in large measure defining the realms subject to the three dominant sovereignties we have referred to,—there were three well-defined legal systems there in vogue, viz., (1) the Danish laws; (2) the Mercian laws; and (3) the West Saxon laws. The confusion consequent upon this difference of legal measures, among people in a common land, and with growing common interests, and under the supreme dominion of a single monarch, led to the establishment, by King Edward the Confessor, of a uniform system, extracted from the three above named. This system was thereafter observed throughout the entire land, and, because of its comprehensive scope, was called the “common law.”²¹

§29. FEUDALISM.—Feudalism is a system of government employed by the ruling powers in the early history of Europe—and by most of said powers still retained in some modified form—whereby the inhabitants of the kingdom, in return for allotments of land, bound themselves to the landowners as their masters; and under which, too, the subject was allotted the ownership, or long lease, of land by the sovereign, in return for military services. The king granted land to his tenants-in-chief, who in turn let—or “feudated”—it to sub-tenants, and they to others, and so on down to the actual tillers of the soil. By his status under this system of tenure of real property, the political, social and economic standing of every inhabitant was determined.

Feudalism as it existed in Europe at the time of the fall of Rome, differed in the several nations. It never became established in this country as a recognized legal and political institution.²²

§30. COMMON LAW “ADJECTIVE LAW.”—The early English adjective law continued in a very primitive state long after

²¹The historical steps leading up to this consummation are not only intensely interesting, but of much practical value to the student of law who seeks to fit himself most completely for high professional standing. We commend the careful reading of the following works dealing with English legal history: Pollock and Martland's

History of English Law; Lee's Historical Jurisprudence; Hallam's Constitutional History of England; and White's Outline of Legal History.

²²See Robinson's Elements of American Jurisprudence; Fiske's Critical Period of American History; and Vol. 4 of Kent's Commentaries on American Law.

the Norman invasion. This seems somewhat strange, in view of the material advance in legal conditions and in substantive law made by William the Conqueror. Subsequent to 1164, however, when Henry II. forced upon the ecclesiastical courts the Constitution of Clarendon, wherein the jurisdiction of such courts was definitely marked out and by which much of the complexity and uncertainty of legal pleading and procedure was removed, we find the system of legal practice gradually improving.

After the Barons of England, in their triumph over kingly usurpations, had, in 1238, decided that the English law as it then stood should not be changed to correspond with the Roman law, the adjective as well as the substantive law became a fixed institution.

During this century, among other important statutes enacted, was that of Westminster II., which, by its failure to provide a remedy in cases for which there was no form of writ of complaint, a form of pleading called equity pleading grew up, bringing thus a new element in the adjective law.²³

²³This form of pleading will be fully the Course.
presented under its own title later in

QUIZZER

ELEMENTARY PRINCIPLES

- 1-§1. What things are subject to law? *All things* *material
spiritual
animate*
- 2- Define law in its general sense. *A rule of a State*
- 3- With what kind of law do these studies deal? *AS formal*
- 4- Whom does it affect? *All mankind* *by man.*
- 5-§2. Define law in its technical sense. *A Rule of civil conduct prescribed.*
- 6- How has the United States Supreme Court defined the laws of a State? *The Rules and enactments*
- 7-§3. What is the purpose of law?
- 8- What is its relation to progress?
- 9- What theory alone justifies legislation?
- 10-§4. Define the Rule of Precedent, or "Stare Decises."

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- 11- What constitute true precedents? *the decisions of the highest C having*
- 12- Can precedents which courts come to regard as impracticable be judicially ignored? *no* *a legislature*
- 13- What is proper method of correcting such precedents?
- 14- When can and when must precedents be ignored?
- 15- Where is the great body of the law found? *Court decisions*
- 16-^{§5}. Upon what is human law founded? *Rights duties wrongs remedies*
- 17- State the theoretical and the actual method of law development.
- 18-^{§6}. How are the rights of persons divided? Illustrate.
- 19- Can you distinguish between legal rights and legal duties. *no*
- 20-^{§7}. How are wrongs classified? *Public - Private*
- 21- Define the two classes of wrongs, and give name designating each. *Crimes Torts*
- 22- What redress does the law provide for each class? *1 Punishment 2d dam ages*

CLASSIFICATIONS OF THE LAW

- 1-^{§8}. How can all law be classified? Define each. *Substantive Adjective*
- 2-^{§9}. State the meaning of the word "municipal" as used in the term "municipal law." - *Govt.*
- 3- Define "municipal law."
- 4- What is the distinction between "written" and "unwritten" municipal law?
- 5- Is the obligation to observe both forms of law alike? *yes*
- 6- What is the relative importance of municipal law to the practitioner? *stands 1st*
- 7-^{§10}. Define international law. *public - private*
- 8- State its two classifications.
- 9- How does it rank in importance with municipal law?
- 10-^{§11}. What is martial law? *Army law*

- 11- When is it invoked? When suspended?
- 12- Define maritime law. *Sea*
- 13- What courts in this country have exclusive jurisdiction over maritime or admiralty affairs, and why? *Federal*
- 14-^{§12} What is the basis of the law of most of the States in this country? *English*
- 15- What State alone is excepted therefrom, and why? *La*
- 16- Why have the States this common basis for their laws?
- 17- Has the United States, as such, any common law? *No*
- 18- What is the only purely Federal law? *Constitution*
- 19-^{§13} What system of pleading was originally adopted by the States? *Adjection*
- 20- What were the objections to such system?
- 21- Is such system now in general use in the States? Name any changes. *code system*
- 22- What are "Practice Acts"?
- 23- What are codes?
- 24- Name, as fully as possible, the States using the respective systems.
- 25-^{§14} State, in their true order, the relative importance of written laws in this country. *1 2 3 4 5*
- 26- Within what limits, in each case, are these laws enforceable?
- 27-^{§15} Whence did what is known as equity arise? *Locality of Court*
- 28- What is the province of equity? *To give justice*
- 29- Give examples where equity gives relief not afforded by the law. *protects from fraud*
- 30- Over what subjects chiefly has equity jurisdiction? *Trusts*

WHERE TO FIND THE LAW

- 1-^{§16} What consideration must be kept in mind in the search for present-day law?

4-15-
OK

- 2-§17. What is the most accessible source of information as to "written" law?
- 3- What is the measure of authority of same?
- 4-§18. To what is "written" law subsidiary in importance to the student and practitioner? And why?
- 5- Where are the rules of legal reason to be found, primarily, and secondarily?
- 6- What is the relative importance of judicial decisions in law study and practice?
- 7- What is this branch of the law sometimes called? And why?
- 8- Are the reported judicial decisions, technically speaking, "written" or "unwritten" law?

HISTORY OF THE LAW

ORIGIN AND EARLY GROWTH

- 1-§19. What knowledge is essential to highest professional standing? *doctrines, principles & rules.*
- 2- What is known as the "philosophy of law"? *function & development*
- 3-§20. What can you say as to the age of law? *Ante dates written history.*
- 4- From what did law originally derive its force? *might*
- 5- How was systematized law developed, and why? *for utility & order*
- 6- How did property and commercial rights first evolve? *from*
- 7-§21. Upon what were early forms of government based? *family*
- 8- Give outline of governmental development.

BABYLONIAN LAW

- 1-§22. Name the most ancient legal code known, and its approximate date. *Hammurabi, 2000-2500 yrs B.C.*
- 2- When did Babylonian jurisprudence reach its perfection? *Time of its overthrow by Persia.*

- 3- What was the relative position of adjective law at that time? *was not as perfect as Substantive law*
- 4- By whom was this law chiefly administered? *Christ*
- 5- What was its principal method of proving cases? *by long oral*
- 6- In what double capacity did witnesses serve in litigation? *also as Jurors*
- 7- What was the unit of government? *The Family*
- 8- State the nature of the marriage contract, and the status of married women. *by purchase contract. Respected by her children - slave of man.*
- 9- What was the status of property-law under this system? *well developed*
- 10- Name any special right in grantors to real property sold. *could repurchase or purchase sold.*
- 11- What can you state as to the law of mortgages, pledges and the like? *Very common.*
- 12- How was the necessity of wills avoided? *Life interest*
- 13- State what you know as to the law of contracts, agency and partnership under this code. *well developed*
- 14- Was Babylonian jurisprudence disseminated to other countries to any extent? If so, how? *yes - by the Persians.*

GRECIAN LAW

- 1-²³. Whence did Greece receive portions of its jurisprudence, and what were they? *Babylonian system. + maritime laws of Phoenicians.*
- 2- What was the relation of Athenian law to that of the rest of Greece? *Highest type.*
- 3- What relative position did the Grecian adjective law occupy? *far in advance of its Substantive law.*
- 4- To what legal system in modern use can the legal procedure of Greece be compared? *Common Law courts*
- 5- Outline the usual course of procedure in Greece. *Judges outlined report given to the court by a jury.*
- 6- How were judgments enforced and was the method unlike that of other ancient systems? *given to successful party to enforce - no.*

- 7- With what did the substantive law chiefly deal?
Domestic relations - Torts - Crimes.
- 8- State how marriage was accomplished in Athens and in Sparta? *Capture of bride. Athens by purchase*
- 9- What were the rights of divorce, and what were the rights of wives? *Husband could.*
wife had no legal rights.

ROMAN LAW

- 1-^{§24}. What is the status of the Roman law in comparison with other legal systems? *Stands out in high prominence above all others.*
- 2-^{§25}. How was a complete view of the ancient law of Rome obtained, and when? *Discovery of the Institutes of Gaius - 1816.*
- 3- What do the Institutes of Gaius reveal? *Evolution of Law*
- 4- In what did Rome differ from other nations in its legal standing? *Equal civil rights - Plebian assembly.*
- 5- When did Rome become a republic? *500 B.C.*
- 6- What political or social divisions existed, and what was their relative legal status? *Plebeians - Patricians*
- 7- What were the "decemvirs," and for what service were they appointed? *Codefiers - drew up a code*
- 8- What constitute the "Twelve Tables"? *Foundation of Roman Law.*
- 9- How were they made, and when, and what is their position in Roman jurisprudence? *Foundation*
- 10- When did the Roman Republic fall, and in whom thereafter lay the legislative power? *100 B.C.*
- 11- What were laws thus promulgated called? *Emperors - Juris Consults - Respondendi*
- 12- What were the jus gentium? State their original purpose and their ultimate service to law in general.
- 13- What were the juris consults, what service were they appointed to perform, and what were their decisions termed? *Jus Respondendi*
- 14- Name some of the great law writers among the juris consults. *Gaius. Scaevola. Paulus. Julianus.*
- 15-^{§26}. State what you can as to the early Roman codes. Name the first great code, and when was it compiled?

Theodosius II 435 A.D.

- 16- What code supplanted all others, and when, and what is its position in jurisprudence? *Justinian Code.*
- 17- Enumerate the several divisions of the Justinian Code, and state when each was promulgated.
- 18- What happened to Roman jurisprudence upon the fall of the Empire? *Adopted by Germanic tribes*
- 19- When, and where, was the Roman law made the basis of legal instruction? *12 Century in European Law Schools*
- 20-§27. Define the term "civil" as applied to Roman law. *all Law*
- 21- What does the term "civil law," as so applied, include?
- 22- What was the canon law? *Ecclesiastical affairs*
- 23- Into what legal system in modern use was the canon law incorporated? *Catholic Church.*

4-17
all.

ENGLISH COMMON LAW

- 1-§28. What especial distinction pertains to this law?
- 2- From what did it arise, upon what is it based, and whence did it receive its chief additions?
- 3- What three principal tribes occupied Britain, and what effect did they have on English law?
- 4- What kingdom of Britain first had a definite legal system?
- 5- Name the early kings whose laws were the chief basis of Alfred the Great's codification.
- 6- What was the nature of Alfred's legal work?
- 7- When did the Normans invade England?
- 8- What marked effect on English law did their advent produce?
- 9- What three legal systems existed in England at the beginning of the eleventh century?
- 10- Who evolved and established a single uniform system therefrom, and when?

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- 11- What was this compilation thereafter called?
- 12-§29. Define feudalism.
- 13- Outline its operation.
- 14- Was it uniform throughout Europe?
- 15- Did it ever become established in the United States?
- 16-§30. What was the status of the early English adjective law?
- 17- What was the Constitution of Clarendon, and by whom was it enacted?
- 18- What effect did it have on the adjective law?
- 19- What decree was issued by the Barons in 1238, and what effect did it have on the law?
- 20- What new element was introduced into English law by the statute of Westminster II?

*Judge's questions answered +
revised on 4-18-11.*



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Frank C. Smith, LL. B., Dean.

LESSONS 2 to 9.—

TITLE III.—CONTRACTS.

By R. W. Core, A. B., LL. B., and C. H. Sayles, LL. B.

LESSON 2.—

CHAPTER I.

NATURE, KINDS AND REQUISITES.

- §1. Importance of Subject.
2. Definition.
3. Requisites.
4. Kinds of Contracts.
 - (a) Express.
 - (b) Implied.
 - (c) Quasi.
 - (d) Executed.
 - (e) Executory.
 - (f) Partly Executed and Partly Executory.
 - (g) Absolute and Conditional.
 - (h) Valid.
 - (i) Void.
 - (j) Voidable.
5. The Contractual Obligation.
6. Same—Essentials and Sources.

§1. **Importance of Subject.**—Contracts is the most important, as well as the most extensive subject of the law. There is no relation of a business character; no transaction involving a duty to compensate another for some benefit received, or to recompense one for some injury done,—and, under certain circumstances, permitted to be done—him; no obtaining or accepting values from another—except by his voluntary gift—that does not actually or impliedly, by intention of the parties thereto, or by operation of law, constitute a contract that is legally enforceable accordingly.

While this is true, it is equally so that a great many transactions, entered into with great care and nicety of arrangement, and intended by the parties to be legally binding upon one another, and therefore bona-fidely understood by them to be legal contracts, are, for the lack of some necessary element or because of the introduction of some fatal

factor, not legally contracts, and hence not enforceable by law. The importance, therefore, of a clear and accurate knowledge of the legal responsibilities and duties out of which contractual obligations spring, and by which they are created and creatable, and of the legal essentials of all valid contracts and contractings is apparent.

§2. **Definition.**—No difficulty in legal writing or in judicial decision, has been found greater, by authors and judges, than the framing of a definition of the word Contracts which will meet every legal essential and element of such undertakings, and express no less, or suggest no more, than exactly what is required to define the legal requisites of a legally binding agreement. However, a definition of this term in its legal sense, can convey to the student only an inceptive and partial knowledge of what a contract really is, legally, though stating in apt phrase its legal elements. A clear and ample understanding of what a contract is, and what it is not, can be had only by a mastery of each of such elements. With this by no means unnecessary preface we give the following accepted definition, and then separately discuss its stated parts, viz:—A contract is an agreement, between two or more competent parties, for a sufficient consideration, to do or not to do some thing that is lawful.)

§3. **Requisites of a Contract.**—A critical scrutiny of the foregoing definition shows that it states five requisites of a legal contract; that is to say that it consists of five essential parts viz:—(a) an agreement, (b) between two or more competent parties, (c) for a sufficient consideration, (d) to do, or not to do some thing, (e) that is lawful.

This expresses all there is to a contract, and anything less than this—i. e. the omission of any one of these factors—will not constitute a legally valid contract enforceable at law. A contract therefore naturally divides itself into the following heads: (1) The Agreement; (2) The Parties; (3) The Consideration; (4) The Subject Matter; (5) Lawfulness of Purpose. In this order we shall discuss the whole body of contracts.

§4. **Kinds of Contracts.**—Contracts, speaking generally, are divisible into express, implied, and quasi,—or con-

contract

structive—contracts. They, again, may be either executed, executory, partly executed and partly executory, absolute, conditional, valid, void, or voidable.

(a), **Express.**—An express contract is one into which the parties have entered definitely and designedly, either orally or in writing, agreeing specifically as to the undertaking, and what share or part each shall have and do therein.

(b) **Implied.**—An implied contract is one where the parties have entered into no express and definite agreement or understanding, but where their respective conduct with reference to some particular thing, warrants the conclusion that their intention then was to thereby contract with one another. In an implied contract the intention of the parties is not expressed, but, from their acts, an agreement in fact, which created an obligation, is implied or presumed by the law.¹

Express and implied contracts cannot arise out of the same transaction. If parties expressly agree as to a certain matter, that constitutes the contract,—granting that all the necessary contract elements are present,—and such agreement is an express contract. If parties do not so agree, the law upon a proper state of facts, raises a promise, and that is an implied contract. A contract is either one or the other; it cannot be both.²

(c) **Quasi.**—Quasi contracts, strictly speaking, are not contracts, but are claims arising independently of any agreement and which the law recognizes as just, and which accordingly it will enforce. They are created by law to compel fair dealing between parties where one endures some disadvantage by which another benefits, and so compels the latter, in an action by the former, to render him proper compensation therefor.³

(d) **Executed.**—An executed contract is one where the conditions on both sides have been fulfilled, and nothing remains to be done under the contract. A contract which is executed is therefore a completed contract. It is performed, and all obligations thereunder are discharged.

(e) **Executory.**—An executory contract is a contract

¹ 9 Cyc., 242.

² Austin Juris, 4th Ed., 944.

³ Walker v. Brown, 28 Ill., 378.

wherein that which is undertaken is to be done in the future, on a stated date or within a prescribed time. In such contracts the contractual obligation continues obligatory upon all parties until the undertaking is completed.

(f) **Partly Executed and Partly Executory.**—Those contracts where one party has performed the obligation thereby imposed upon him, but something remains to be done by the other party, come under this head. Until all the parties have fulfilled their obligations the contract is not fully executed, and upon those who have yet some requirements to meet, the obligation abides until full performance is made.

(g) **Absolute and Conditional.**—A contract, the obligation of which is not dependent upon, or determined by, the happening or not happening of any stated event, but which goes into effect immediately, is called an absolute contract.

Conditional contracts are the antithesis of absolute contracts, and their binding force and effect is dependent upon the occurrence or non-occurrence of some stated happening.

(h) **Valid.**—A valid contract is, of course, one wherein all the essentials prescribed by the law, as to parties, consideration, legality of subject matter and of purpose, are fully met.

(i) **Void.**—Void contracts are those which lack some one or more of the legal requisites of valid contracts. In such cases there is really no contract at all and hence the courts will give them no judicial recognition, except to refuse enforcement under all circumstances. Illegal contracts are always void.

(j) **Voidable.**—Contracts which, while complying fully with the requirements, of the law as to substance have an element therein giving legal grounds for avoiding it, at the option of one or more of the parties thereto, are voidable. Or they may be defined as contracts that may be legally binding, but yet are capable of being affirmed or repudiated at the will of a party thereto.

Contracts of minors, and those obtained by fraud, duress and undue influence, are familiar illustrations of this class. In such cases the minor after he reaches his major-

ity, and the injured party when the fraud is discovered, or the duress or undue influence is removed, may either repudiate the contract for the cause given, and have it declared void for that reason, or may ratify and affirm it, and be bound thereto, if in other respects it is wholly within the law.

§5. **The Contractual Obligation.**—(The obligation of a contract is the legal binding force of the contract.) That is to say that which makes an agreement legally binding, which gives the right to a party thereto to bring suit for a breach thereof,—that which forms the legal tie by which one is bound to do, or not to do, some act, to, for, or on behalf of another—is the obligation of the contract.

This obligation pertains to and binds only those who are parties to the contract, either as the direct participants therein or, under certain circumstances to be noted later, beneficiaries thereunder, and it can be taken advantage of only by such parties. Contract obligations and contractual relations are legally created only by a legal agreement between parties, are obligatory only upon such parties, and can be enforced only by them, or by those in whose behalf upon a sufficient consideration they are made.

§6. **Same—Essentials and Sources.**—In order that an obligation may be enforceable at law it must relate to definite acts or forbearances. (If an agreement be so indefinite that no one can say what was agreed upon, a court cannot enforce it. Such an agreement cannot create any legal obligation and hence cannot give rise to a contract.)

The obligation must be reducible to a money value. This is necessary to distinguish an agreement affecting legal relations from that which affects only social relations, as courts can deal only with matters whereby a legal relation is to be effected. (We may therefore say, generally, of the legal obligation that it is a control, between definite parties, over certain acts, which are reducible to a money value.)

The first and most direct source of legal obligations is that of an agreement. The obligation results from the acceptance by one party of the offer of another, and this is the legal tie binding both parties to the fulfillment of their agreement. It may also arise from tort,—that is, where a private right of person or of property has been violated by

trespass, assault or in some other manner. In such cases the wrong doer is legally bound to pay for the damage he has caused, but the obligation is not created by an agreement of the parties, but springs from the wrongful act itself.

Obligation may also arise from breach of contract. Where for instance A is under promise, given for a consideration, to B, to do certain acts, and breaks his promise, a right of action arises to favor B. This obligation depends upon an agreement that has been violated, but does not spring from the agreement itself. Obligations also arise from what are known as quasi contractual relations, the characteristics of which have already been defined, and the obligation of which, it will be remembered, is imposed by the law, and does not spring from the consent of the party charged.

Answered - + in - 4-21-11

CHAPTER II.

COMPETENCY OF PARTIES.

§7. Who may Contract.

8. Limitations upon Right to Contract.

- (a) Generally
- (b) Aliens
- (c) Convicts
- (d) Drunkards
- (e) Infants or Minors
- (f) Insane Persons
- (g) Married Women
- (h) Spendthrifts

§7. **Who May Contract.**—All natural born persons of legal age, sound mind, and not under some form of limitation or disability to contract, prescribed by law, are capable of making valid contracts. The legal presumption is in favor of one's ability to contract. Anyone, therefore, who alleges another's legal incapacity so to do has the burden of proof on him to show such incapacity.

Corporations, duly organized may make valid contracts upon matters within the scope of their corporate authority as fixed by their charters, or articles of corporation.

§8. **Limitations Upon Right to Contract.**—(a) **Generally.**—Certain persons are, for various reasons, incapacitated in whole or in part by law from entering into contracts. To some the contractual right is denied in toto; to others

partially, either for a certain period of time, or during the existence of a certain legal relation, or legal condition, or as regards certain subject matter of contracts, and the like. The principal classes thus restricted are, aliens, convicts, drunkards, infants or minors, insane persons, married women and spendthrifts.

There are others upon whose right to contract, under certain conditions the law lays limitations, but these are those who act in a representative or fiduciary capacity under certain authority or legal sanction given them, such as agents, partners, public and corporate officers, and trustees, and whose contracts made by them as such personages, must be wholly within the authority under which they act, in order to be upheld. Such limitations will be fully presented in the lessons covering such subjects.

(b). **Aliens.**—An alien is a foreign-born resident in a country in which he does not possess the rights of a citizen; i. e. he is a foreigner. Originally aliens were not granted any legal rights of property or contract beyond the merest fraction sufficient to enable them to provide for their immediate necessities and comforts and to accumulate an un-consequential amount of personal goods. This has become so far changed in recent years, especially in this country, that in times of peace with an alien's government, he has now full power to contract and to invoke the law of the land to enforce his rights thereunder. In case of war, the citizens of the enemy-country, resident here, are impressed with the enemy character, and technically, the legal rights enjoyed by them in times of peace between the countries, are denied them during hostilities.¹ Actually, however, unless such an alien is actively belligerent, the technical rule is not actively enforced.

Aliens cannot procure title to public lands directly from the government, and in some states are restricted in the right to acquire real estate by purchase, or to hold it beyond a prescribed time if it is inherited by them. Naturalization of course carries with it full citizenship rights.

(c) **Convicts.**—(In the olden days one convicted of felony was deemed and was in fact out of the law, and hence became known as and was called an outlaw.) As such he

¹ De Jarnett v. De Guerville, 36 Mo., 440.

was denied the right to possess property, make contracts, sue and be sued, and many other legal benefits. Today in some jurisdictions substantial remnants of these old severities remain; but, generally, conviction for crime does not now forfeit any property or legal rights beyond those pertaining to the functions of citizenship. In most states, probably in all, therefore, a convict of legal age and otherwise capable, has full legal right to make most contracts, and to appeal to the courts to enforce, or defend against, them.

(d) **Drunkards.**—Persons so completely under the influence of intoxicating liquor or drugs as not to be able to intelligently comprehend what they are doing at the time they entered into a contract are deemed not to have then possessed the necessary quality of discretion or understanding to make a wholly valid agreement. They can then defeat the enforcement of a contract so made, by pleading such incompetency.² Contracts so made are merely voidable not void. Persons thus entering into such engagements may therefore upon recovering their normal sense, elect to affirm or to disaffirm them.

(e) **Infants, or Minors.**—Persons under twenty-one years of age, but in some states, women under eighteen years of age are legally infants or minors. Except within a very narrow limit, closely guarded by the law, infants have no right of contract. There are, however, certain contractual obligations imposed by law upon, or deliberately entered into by, them to which the law under proper circumstances, gives full recognition and enforcement.

Speaking generally, it may be said that the contracts of infants for necessities, such as food, clothing, lodging, medical attention, school and the like to a reasonable value thereof, furnished him at his request are valid and binding upon him.³ The test in such cases, is:—(Were the goods contracted for, necessities? If so, he is bound therefor; otherwise, if they were not.) Articles of ornament, pleasure or luxury merely, are not necessities; those for use for his personal needs, not otherwise supplied, and of a grade to meet his station in life, and furnished him when he is not living

² Bates v. Ball, 72 Ill., 108; Foote v. Tewksbury, 21 Vroom 97.

Park Co., 127 Iowa, 131; Middlebury College v. Chandler, 16 Vt., 686.

³ Gay v. Ballam, 4 Wench 403; Earle v. Reed, 10 Met., 387; Wallin v.

with and is not supported by his father are.⁴ An infant is not liable for money borrowed even though he says to the lender that it is required for necessities, unless the latter makes certain that it is so expended. Nor can he be held to pay more than the reasonable value of necessities furnished him even though he expressly agreed to pay a higher price, and even gives his promissory note therefor.⁵

Where an infant is liable on some tort committed by him—some injury of a civil character done to another—he will be held liable on any contract he enters into in settlement of his wrong.⁶ So, too, all contracts imposed upon him by operation of law, all quasi contracts (that is to say which his actions and dealings create by the law's interpretation thereof,) and all contracts which by statute he is authorized to make, will be held fully binding upon him by the courts.

The modern rule concerning an infant's contracts, other than those that are held fully valid as above set forth, is that they are voidable by him. That is to say he has the privilege of repudiating them if he wishes to do so, and if he does not do this, they are binding upon him. The other party to the agreement however, if he be of full age, is legally held thereto unless the minor disavows. In other words a party of legal age cannot, on the ground that the other party to a contract is a minor, disaffirm such contract; whereas the minor, can. This he may do at any time during his minority, or within a reasonable time after attaining legal age.⁷ And the fact that he secured the contract by falsely claiming that he was of age, does not effect his right⁸. Ratification or repudiation may be either expressly made, or shown by the infant's actions.

(f) **Insane Persons.**—As in the case of infants the contracts of persons of unsound mind, created by law and those for necessities for himself and his family if he has one, are held valid;⁹ to the extent at least as in the case of infants that he must pay a reasonable price therefor, but not necessarily the contract price if it be exorbitant.

⁴ Clark on Contracts, 231; Benjamin on Contracts, 152; Lynch v. Johnson, 109 Mich., 640.

⁵ Locke v. Smith, 41 N. H., 346.

⁶ Ray v. Tubbs, 50 Vt., 688; Stowers v. Hollis, 83 Ky., 544.

⁷ Bradford v. French, 119 Mass., 366; Studwell v. Shopter, 54 N. J., 252.

⁸ Studwell v. Shopter, Supra.

⁹ Sceva v. True, 53 N. H., 627; Reando v. Misplay, 90 Mo., 251.

¹⁰ Ducher v. Whitson, 112.

Persons who have been judicially adjudged insane cannot themselves, make a valid contract. Their conservator or guardian must do this for them. The contracts of others of unsound mind are merely voidable, at their option if the unsoundness was only temporary at the time the contract was made; or at the option of the person legally qualified to choose for them, if their mental unbalance is chronic.¹⁰

Where, however a party of sound mind acts in entire good faith in a transaction, and in ignorance of the insanity of the other, and no unfair advantage is taken of the latter, the latter can repudiate the contract later, only when by so doing the other party will not be injured thereby.¹¹

The basis of the rule pronouncing contracts of persons of unsound mind void, or voidable, as the circumstances stated warrant, is that, as we have already seen, the minds of parties must intelligently meet in order to create a valid legal obligation, and because insane persons are incapable of understanding the nature of their acts, and have not a legal contracting mind.

(g) **Married Women.**—Until within comparatively recent years, when, by statute, married women, in this country particularly, have been given practically all the legal rights of property and of contract, which they had as single women, a married woman could make no contract binding upon herself or her estate. In fact, under the common law, a woman, upon her marriage, legally lost her identity, her personal property passed to the ownership and possession of her husband, she could enter into no contractual relations, her inheritances, and her earnings after marriage, belonged to him, and even real estate held by her before marriage was burdened with rights of the husband that rendered her practically only the holder of the title thereof.

Today, however, she has almost unlimited right of contract and of ownership and possession of real and personal property. Such limitations as yet remain upon such rights will be treated under the respective subjects where they exist.

(h) **Spendthrifts.**—Improvident persons who waste their substance by unprofitable spending, may, in most states, by judicial proceedings, be adjudged incapable of

¹⁰ Molton v. Camroux, 2 Exch., 489.

conducting their affairs on that account. Such persons, known as spendthrifts, while undoubtedly not of full sound mental caliber, yet are not in that mental condition warranting their adjudication as insane persons, and so cannot be rightly so treated. To conserve their property in the interest of themselves and of those dependent upon them, and thus avoid the possibility of all or some of them becoming public charges, the law provides for the appointment by legal action, of conservators for such incapables. When this is done, their contracts are no longer unquestionably valid, but become voidable under proper circumstances.

QUIZZER.

NATURE, KINDS AND REQUISITES.

- 1-§1. What is the relative importance of the subject of contracts, as to the general body of the law—state fully?
- 2- What is the importance of an accurate knowledge of the law of contracts in business matters?
- 3-§2. Define a contract?
- 4-§3. State the five requisites of a legal contract.
- 5-§4. Into what classes are contracts generally divisible?
- 6-(a) Define an express contract.
- 7-(b) What is an implied contract?
- 8- Can an express and an implied contract arise out of the same transaction—and why? —
- 9-(c) What can you say concerning quasi contracts?
- 10- How are they created and for what reason?
- 11-(d) What is an executed contract?
- 12-(e) Define fully an executory contract.
- 13- In such contracts when does the contractual obligation terminate?
- 14-(f) What are partly executed and partly executory contracts?
- 15-(g) Define an absolute contract.
- 16- Define a conditional contract.
- 17-(h) What is a valid contract.
- 18-(i) Define void contracts.
- 19- How do courts regard void contracts?
- 20-(j) What is a voidable contract?

- 21- What is the distinctive characteristic of a voidable contract?
- 22- Name some common forms of voidable contracts, and state how they can be validated, or be made void.
- 23-§5. What is the obligation of a contract?
- 24- Upon whom is the contractual obligation binding?
- 25- How are contract obligations created, and by whom can they be enforced?
- 26-§6. What is essential in order to render a contract obligation legally enforceable?
- 27- How does indefiniteness of a contract affect the legal remedy thereon?
- 28- To what basis of value must contractual obligations be reducible?
- 29- With what relations only do courts deal?
- 30- What is the primal source of legal obligations?
- 31- How otherwise, than from contracts, can legal obligations arise?
- 32- In such cases from what does the obligation spring?
- 33- Can an obligation spring from a breach of contract?
- 34- Can a legal obligation arise from a quasi contractual relation?

COMPETENCY OF PARTIES.

- 1-§7. Who may legally make contracts?
- 2- What presumption pertains as to one's ability to contract?
- 3- Upon whom is the burden of proof where incapacity to contract is alleged?
- 4- May corporations contract, and what limitation, if any, is there to their right so to do?
- 5-(a) §8. What can you say as to the limitation upon certain persons, of the contractual right?
- 6- Name the principal classes of persons thus restricted?
- 7- Upon what other persons, and for what reason, are there restrictions placed upon their contract right?
- 8-(b) Define an alien.
- 9- What legal rights did aliens originally have, and to what extent have such rights been enlarged?
- 10- When is an alien's right under the law suspended?

11. Can aliens procure title to public land—if so, how?
- 12- How does naturalization affect an alien's rights?
- 13-(c) What was the old rule concerning the legal rights of convicts—state fully?
- 14- What mitigation of the old law now exists ?
- 15- Can a convict now legally make contracts?
- 16- Have convicts a legal standing in the courts?
- 17-(d) What extent of intoxication will legally incapacitate one from making a contract—and why?
- 18- How can one thus incapacitated defeat the enforcement of a contract thus made?
- 19- Are such contracts void or voidable?
- 20-(e) Define infants, or minors.
- 21- What rights of contract have infants?
- 22- Are the contracts of infants ever binding upon them?
- 23- Can you name any contracts of an infant legally binding upon him?
- 24- What is the test by which a contract will or will not be held so binding?
- 25- Is an infant legally bound upon contracts merely of luxury or pleasure?
- 26- Are infants bound on contracts for borrowed money—if so, when?
- 27- What is the limit of value for articles furnished him to which an infant can be legally held?
- 28- Is an infant liable for his torts?
- 29- What can you say as to an infant's liabilities, on quasi contracts?
- 30- When, and when not, are contracts not otherwise binding upon him, made legally binding?
- 31- Is the other party to a contract with a minor, if of legal age, bound thereto?
- 32- Can one, legally competent, avoid a contract simply on the ground that the other party is a minor?
- 33- How can a minor's ratification or repudiation of a voidable contract be shown?
- 34-(f) What can you say as to the legality of contracts made by persons of unsound mind?
- 35- Can persons judicially adjudged insane make valid contracts?
- 36- Who can legally make contracts for such persons?

- 37- What is the nature of contracts made by others of unsound mind?
- 38- What limitation, if any, is placed upon the rights of such persons to repudiate their contracts?
- 39- What is the basis of the rule pronouncing contracts of such persons void or voidable?
- 40-(g) What, under the old law, was the status of married women with reference to their contractual rights?
- 41- State the common law status of married women with reference to their personal and real property, their inheritances, and earnings after marriage.
- 42- What are the present legal rights of married women?
- 43-(h) What can you say as to the limitations of the right of a spendthrift to contract?
- 44- How can their rights be legally abridged?
- 45- When do a spendthrift's contracts become voidable?

LESSON 3.—

CHAPTER III.

CONSIDERATION.

- §9. Definition and Essentials.
10. Consideration in Sealed Contracts.
11. Necessity of Consideration.
12. Value and Adequacy.
13. Kinds of Consideration.
14. Past Consideration.
15. Same—Exceptions to General Rule.
16. Barred Debt as Consideration.
17. Forbearance as Consideration.
18. Compromise as Consideration.
19. Existing Legal Obligations as Consideration.
20. Composition with Creditors.
21. Moral Obligation as Consideration.
22. Mutual Promises as Consideration.
23. Unreal Consideration.
24. Impossible Consideration.
25. Failure of Consideration.

§9. **Definition and Essentials.**—In the lesson on Offer and Acceptance we shall consider the method by which the common intention of contracting parties is to be reached so as to form a legal contract. But it is not sufficient that such common intention merely refer to legal consequences and be reached as in the simple manner there set forth. There must be further evidence of the intention of the parties to contract, an additional and essential factor, in the absence of which no legal obligation will be created. This essential is the consideration of the contract and is the legal basis on which every simple contract must rest. Without the factor of a consideration there cannot be a legal binding contract.

Consideration is the thing of value rendered by one to another at his request, express or implied, in return for some thing of value rendered him, and mutually agreed upon as the basis of their respective undertakings.

Clark on Contracts says “Consideration means that which moves from the promisee to the promisor at the latter’s request in return for his promise.” Knowlton defines consideration as “A legal benefit to the promisor, or a legal detriment to the promisee,” and this is correct. Money, or money’s worth is a common form of consideration; so, too, are work and labor.) However, consider-

ation may consist in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."¹ It is essential that the benefit to be conferred, or the detriment to be suffered, be something of value in the eye of the law. A court will insist upon this although it will not inquire into the adequacy of the consideration. Furthermore the consideration must be legal. This means in general, that it must not violate any statute, the common law, or public policy. It must be either present or future, but must not be past, since a promise to be binding must be made in contemplation of a present or future benefit. We will consider these essentials of consideration in their order.

§10. **Consideration in Sealed Contracts.**—As we shall learn in an early lesson the placing of a seal on an agreement makes the agreement one of especially high legal character and importance. The act of placing a seal imposes upon the transaction a legal solemnity and dignity which thereby raises the contracts by which they are witnessed, into a class by themselves.

The principal practical legal benefit attached to sealed instruments is that the seal thereon attests, or rather raises the conclusive legal presumption of, a consideration. Indeed, the legal fact is that a contract under seal does not require an actual consideration to support it.² The seal of itself, imports a consideration, and the parties thereto are estopped to deny it.³ Consequently a sealed contract is legally binding and can be legally enforced not only if no consideration is stated therein, but if in fact there was no consideration therefor.)

§11. **Necessity of Consideration.**—A consideration is necessary to the validity of every contract. A mere naked promise to do a thing unsupported by a consideration therefor, moving from the promisee, is not legally binding on the promisor and is not enforceable in the courts.⁴ A leading case on this principle is that of *Rann v. Hughes*.⁵ John

¹ Currie v. Miss. L. R., 10 Exch., 162.

87.

² Gooch v. Goodman, 2 Queen's Bench, 580.

⁴ Weaver v. Fries, 85, Ill., 356; Litz. v. Goosling, 93 Ky., 185.

⁵ Van Valkenburgh v. Smith, 60 Me.,

⁵ 7 T. R., 350.

and Mary Hughes owned property which they wished to divide. The property being difficult of division, it was agreed that John should take the larger share and pay Mary \$5000 to equalize the difference. Before this payment was made John died and his executrix, who was the defendant in the case, promised to pay the money out of her own estate. This promise was made to the plaintiff Rann as executor of the estate of Mary Hughes. When Rann brought suit to enforce this promise the court held that though the promise was made in writing no consideration appeared for it and therefore the promise was void.

§12. **Value and Adequacy.**—The consideration must be of value. The adequacy, thereof, however, is a matter into which the courts will not inquire. The law insists that there be some consideration, but goes no further on that point. If a man gets what he bargains for the law will not inquire into its value, or whether its value is equal to what, or less or greater than, he gave for it, as that would be “the law making the bargain instead of leaving the parties to make it.” (The law will be satisfied if something is done, or promised, by the promisee, as consideration for the promise made, or for the thing delivered to him.) A promise to pay \$5000 if the promisee would refrain from the use of tobacco and liquor until he reached the age of twenty-one, has been held to be based upon sufficient consideration, namely, the forbearance by the promisee from the legal right to do these things if he wished.⁶ A promise to pay \$500 if the promisee would attend the promisor’s funeral, has also been held enforceable.⁷

In *Bainbridge vs. Firmstone*,⁸ B gave permission to F to weigh two boilers which F promised to return in the condition in which he found them. He took the boilers to pieces to weigh them and then refused to put them together again; whereupon B brought suit. It was argued that the weighing of the boilers was neither a detriment to the plaintiff nor a benefit to the defendant, and consequently that there was no consideration to support F’s promise. The court overruled this argument and in deciding in favor of B said: “The defendant had some reason for wishing to

⁶ *Hamer v. Sidway*, 124 N. Y., 530.

⁸ A. & E., 743.

⁷ *Earle v. Angell*, 57 Mass., 294.

weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which permission he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive." In *Wolford vs. Powers*,⁹ an action was brought on a note given as consideration for a parent naming his child after the maker of the note. The court held that the promise was based upon a sufficient consideration inasmuch as the parent gave up his right to name the child.

In courts of equity, however, an apparent exception to the foregoing principle appears in cases where the consideration is so grossly inadequate as to furnish evidence of fraud, or imposition in the transaction. In such cases equity will grant relief to the injured party but it is the fraud, and not the inadequacy of consideration, in the matter which vitiates the contract.¹⁰

§13. **Kinds of Consideration.**—There are two kinds of consideration—good and valuable. Good consideration may be based upon good will, friendship, relationship, and the like. Valuable consideration, is money or money's worth; that is to say, is cash, or its equivalent, such as goods, property, labor or the fruit of labor.

The consideration for a promise may be an act, a forbearance, or a promise to act or forbear. When a promise constitutes the consideration for another promise, the contract is said to be upon an executory consideration. An illustration of this is that of mutual promises to marry. (A promise is a good consideration for a promise,) and the principles stated regarding the consideration in general, will apply to an executory consideration. Such mutual promises must be simultaneous and they are governed by the rules of offer and acceptance.

A consideration is said to be executed when one of the parties has, in either the act that constitutes the offer or the acceptance, done all that the contract requires him to do, and the further performance of the contract is left to the other party only. Leake on Contracts describes this as the "acceptance of an executed consideration" and as "a consideration executed upon request." These forms of consid-

⁹ 85 Ind., 294.

¹⁰ *Randolph v. Quiduich Co.*, 135 U.

S., 45; *Hough v. Hunt*, 2 Ohio, 295.

eration were spoken of under Offer and Acceptance as the offer of an act for a promise, and the offer of a promise for an act. The acceptance of an executed consideration is well illustrated by a delivery of goods, or the doing of services under such circumstances that a promise to pay therefor is created by an acceptance thereof. In such a case the offeror has done his part as soon as he becomes a party to the contract, while the offeree or acceptor has his part of the contract still to perform. (A consideration is executed upon request when, for instance, a party furnishes information in response to an offer of reward.) In such case it is the acceptor who completes his performance when he becomes a party to the contract and the offeror has his part of the contract yet to execute by paying the promised reward.

§14. **Past Consideration.**—A past consideration will not, as a general rule, support a promise, for the reason, as we have seen that a promise to be binding must be made in view of a present or future benefit. (A past consideration may be defined as some past act or forbearance by which one has been benefited but without incurring any legal liability.) (No matter how beneficial such a service may have been to the party sought to be charged, it will not create a legal liability unless rendered at his express request or under such conditions that a request will be implied by law.) (Even an express promise, on such a consideration is not, alone, sufficient to give rise to legal liability.¹¹)

§15. **Same—Exceptions to General Rule.**—(A past consideration will support a subsequent promise, if such consideration was given at the request of the promisor.) The leading case on this subject is Lampleigh v. Braithwait,¹² wherein the defendant had, in the course of a quarrel with one Mahume, inflicted injuries upon the latter from which he died. Braithwait, was thereupon tried and sentenced to death. Lampleigh, undertook to procure his pardon, and after many efforts obtained an audience with King James, with the result that the king granted Braithwait an unconditional pardon. Upon gaining his liberty Braithwait promised to pay Lampleigh \$600 as a compensation for the

¹¹ *Parsons v. Robinson*, 15 N. Y., Sup., 138; *Shealy v. Toole*, 56 Ga., 210; *Chamberlain v. Whitford*, 102

Mass., 448.

¹² 1 *Smith's Leading Cases*, 267.

services rendered. When the time for the promised payment arrived, he declined to keep his promise and Lamplough sought redress in the law. The court held that, while ordinarily a voluntary promise cannot be enforced, yet if, as in the case at bar, the past services were rendered upon the request of the party who subsequently gives the promise based upon such services, the promise will be held legally binding, for it is not a naked promise but couples itself with the request and the benefits procured thereby to the party promising.

This ruling has been criticised by various authorities. It has been suggested by Anson in his work on Contracts that the true rule is that the subsequent promise is binding only when "the request, the consideration and the promise, form substantially one transaction." It has also been said that the promise must be such as the law implies from the nature of the consideration and the transaction. In other words, that the promise must not be different from that already implied by the law.¹³ It has also been held that "if the consideration, even without request, move directly from the plaintiff to the defendant, and inures directly to the defendant's benefit, the promise is binding though made upon a past consideration.)

14 -
 §16. **Barred Debt as Consideration.**—Another exception to the rule holding that a past consideration will not support a present promise arises according to some writers, in the case of a promise to pay a claim barred by the statute of limitations. A debt so barred may constitute the consideration of a new promise to pay, for a debtor may renounce the benefit of a law made for his advantage. If he does so, and promises to pay his obligation, he is bound to keep his promise.¹⁵ However, no other promise than one to pay the debt itself will be supported upon the consideration of a debt barred by the statute of limitations. There is considerable doubt whether the action in such case is upon the new promise or upon the original contract. As a rule there must be a promise in writing, or such a distinct and express recognition of the debt, as to raise an

¹³ Merrick v. Giddings, 1 Mackey (D. C.), 394.

¹⁵ Dusenbury v. Hoyt, 53 N. Y., 521; Hawkes v. Sanders, Cowper, 289.

¹⁴ Booth v. Fitzpatrick, 36 Vèr., 681.

implied promise to pay it. To prevent the operation of the statute of limitations there must not only be an admission of the existence of the debt, but language used that will imply a promise to pay it. For this reason, and inasmuch as the action on the original contract is barred, some courts hold that the action is on the new promise, while others say that the debt is not destroyed by the statute of limitations, but only the right of action is lost thereby, and that when that is restored by a new promise to pay the debt the action is still on the original contract, and not on the new promise. A number of cases may be read to good advantage supporting both theories.¹⁶

§17. **Forbearance as Consideration.**—Forbearance to exercise a legal right, may be sufficient consideration for a promise. Thus, the relinquishment of a homestead entry on public land, and the withdrawal of a contest against the claim of another, is a valid consideration for a promise to pay money.¹⁷ The right foreborne may be a doubtful one and may exist against a third party instead of the promisor, but in either case its forbearance will legally support a promise based thereon. However, the claim must be a legal one, as the relinquishment of a claim that could not be enforced would not be a legal consideration.¹⁸

§18. **Compromise as Consideration.**—A compromise to avoid litigation is a common form of forbearance as a consideration for a promise. An agreement wherein one party forbears to bring suit, or agrees to dismiss a pending suit, is based upon a good consideration, and can be enforced.¹⁹ Where the whole debt is undisputed, part payment thereof will not be a legal payment in full, even though it is so agreed at the time; but where the claim is at all in dispute a

¹⁶ Chabot v. Tucker, 39 Cal., 180.
Frisbee v. Seamen, 49 Iowa, 95.
Wesner v. Stein, 97 Pa. St., 322.
Patton v. Hassinger, 69 Pa. St., 311.

Hill v. Henry, 17 Ohio, 9.
Collar v. Patterson, 137 Ill., 403.
In re Kendrick, 107 N. Y., 104.

¹⁷ Pelham v. Service, 45 Kan., 614.

¹⁸ Jones v. Ashburnham, 4 East, 463.

¹⁹ Smart v. Chell, 7 Dowling's Cases, 781. In Parker v. Enslow, 102 Ill., 272, the plaintiff had been accustomed to fill his pipe from to-

bacco on the defendant's counter. The defendant mixed powder with the tobacco and the result was an explosion that injured the plaintiff's eyes. He threatened to bring suit, but accepted the defendant's promissory note for an agreed amount in compromise. In a suit upon the note the court held that if the payee of the note believed he had a cause of action, his forbearance to sue, was a consideration for the note. Its payment was therefore enforced.

partial payment, upon the agreement that it is given and accepted in full will be binding.

To constitute a compromise a valid consideration, it is necessary that the plaintiff believe in his case, and have a bona fide intention of bringing action honestly thereon. If this is so, a compromise, whether it is made before litigation is commenced or afterwards, although he has in truth no cause of action and the defendant knows it, is valid.²⁰ If a man bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action he escapes from the vexation incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it. In such case his conduct would be fraudulent.²¹

An agreement to forbear to bring suit will support a promise although no fixed length of time of forbearance is agreed upon. What is a reasonable time would depend upon the circumstances of each case. Whenever there is an agreement for a length of time not stated, and there is afterwards an actual forbearance, there is a consideration for the promise to pay.²²

§19. Existing Legal Obligations as Consideration.—

An existing obligation is not a good consideration for a new promise. In other words the performance of an act which a party is already under obligation to perform is not a legal consideration for a new promise.²³ There are a number of qualifications and examples of this principle to be set forth. The payment of a smaller sum in satisfaction of a larger claim does not discharge the debt, as we have already seen, unless the claim is a disputed one. This rule is somewhat technical and the courts have shown some readiness to depart from it on slight distinctions. For instance it has been held that a negotiable security of a face value less than the amount of the undisputed claim may operate as a full discharge thereof if given and taken in satisfaction of

²⁰ *Wehrem v. Kuhn*, 61 N. Y., 623.

²¹ *Callisher v. Bischoffsheim*,
5 Queen's Bench, 449.

²² *Traders' Bank v. Parker*, 130 N.
Y., 415.

²³ *Rundle v. Kettering*, 127 Iowa, 6.

the debt.²⁴

The rule above stated is qualified where something other than money is taken in satisfaction of a debt. "The gift of a horse, hawk or robe in satisfaction of a debt is good. For it shall be intended that a horse, hawk or a robe might be more beneficial to the plaintiff than money in respect of the circumstances, or otherwise the plaintiff would not have accepted it in satisfaction," said an early court.²⁵ The giving of further security for a debt, although for a smaller sum, and the acceptance of it as a full payment, extinguishes the entire debt. Thus when a party who owed a certain amount on open account, gave a note for half that sum, secured by a mortgage, under the agreement that it should be accepted in full discharge, the court held that no action could be brought for the balance of the account.²⁶ So, too, the case of a debtor who gives his note indorsed by a third party for a less sum than the debt, the additional security is a good consideration for remitting part of the debt.²⁷ It has also been held that when payment of a part of a debt is, upon the creditor's request provided for in some manner, place or time different from that provided for in the original contract, a consideration thereby arises for the promise of the creditor given therefor.²⁸

The principle underlying these decisions, apparently, is that a simple promise by a creditor to accept a smaller sum in discharge of a larger amount due is void because the debtor does only what he is legally bound to do; but if there is any new term that offers a possibility of legal benefit to the creditor, that furnishes consideration for the promise to forego the balance of the debt.²⁹ Where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be a possibility of legal benefit to which he was not entitled except for this agreement, then the agreement is not a bare promise and will legally hold.

§20. Composition with Creditors.—A composition

²⁴ *Goddard v. O'Brien*, 3 Queen's Bench, Div., 37; *Kellogg v. Richards*, 14 Wend., 116.

²⁵ *Bull v. Bull*, 43 Conn., 455.

²⁶ *Jaffray v. Davis*, 124 N. Y., 164.

²⁷ *Varney v. Conery*, 77 Me., 527.

²⁸ *Schweider v. Lang*, 29 Minn., 254.

Rose v. Hall, 26 Conn., 392.

²⁹ *Hall v. Smith*, 15 Iowa, 584.

Allison v. Abendroth, 108 N. Y., 470.

with creditors may appear to be an exception to the general rule stated, inasmuch as a composition is a parol agreement by a creditor to accept less of a liquidated debt than is due him.³⁰) Nevertheless, where several creditors agree with their debtor, and with each other, to accept a portion, a percentage, of his indebtedness to them in payment of the whole debt, the forbearance of the other creditors is the legal consideration to each one of them, as it precludes the possibility of his losing his entire claim.

When an insolvent firm makes an agreement with all its creditors, whereby the creditors agree to accept, for instance, twenty-five cents on the dollar in full satisfaction of their claims, the firm, by complying therewith, is discharged from its indebtedness.³¹ As stated before a binding compromise of an undisputed indebtedness cannot be made between a debtor and a single creditor, as a legal consideration would in such case be lacking, but where all one's creditors join in such agreement the rule changes for the reason given. If creditors merely agree to extend the time of payment, there is no composition.³² However, if the debtor makes some concession, such for instance as the payment of interest in advance, the agreement to extend time will be valid.³³ In case the debtor fails to comply with the terms of the composition, the creditors may sue for their original claims.³⁴ A composition is valid without the debtor being a party to it, as his acting upon it is sufficient to bind the creditors. (It must be kept in mind that a composition with creditors is not an exception to the general principle of consideration.) The creditor not only gets the payment of the agreed percentage of his claim from the debtor, but he gets a promise from the other creditors that they too will be content with the same percentage.

§21. **Moral Obligation as Consideration.**—A mere moral obligation is not a valuable consideration, and will not support a promise. If a debt is voluntarily released by the creditors, a subsequent promise to pay it, made by the debtor, is without consideration, and accordingly void, although he is still morally obligated to his creditors.³⁵ Where goods were sold to a minor child without the

³⁰ Kahn v. Gumberts, 9 Ind., 430.

³¹ Pierce v. Jones, 8 S. C., 273.

³² Henry v. Patterson, 16 Pa. St., 346.

³³ Warner v. Campbell, 26 Ill., 282

³⁴ Edwards v. Coombe, 7 C. P. 519.

³⁵ Hale v. Rice, 124 Mass. 292.

parent's knowledge or consent, it has been held that the subsequent promise of the parent to pay was invalid, as being without legal consideration.³⁶ However, where there is some antecedent legal liability to which a moral obligation can attach, a promise based thereon will acquire a binding character.³⁷ For instance, where one promises to pay a debt barred by the statute limitations, or, after he reaches his majority promises to pay a bill incurred when he was a minor.

While it is true that where circumstances of urgent necessity put a person under moral and legal obligation to do an act for which the law may imply a promise to pay, the general rule is that any act done for the benefit of another without his request is deemed voluntary, and purely a gift of service, and no action upon it can be maintained. This rule is based upon the principle that a man cannot involuntarily—that is without his acquiescing will—be put in debt to another. Thus when B moved a stack of J's wheat to save it from fire without the knowledge of J, he was not allowed to recover for his work as the act was wholly voluntary, and the moral obligation on J to make some just compensation for the service was not sufficient in law to permit a recovery by legal action.³⁸ However, the known acceptance of a benefit may raise an implied promise to pay therefor. Thus if a man build a house or fence upon the land of another with his, the latter's knowledge and assent, the law raises an obligation on his part to pay for it what it is reasonably worth, since he has been benefited to that extent and knowingly permitted it built. If he did not intend to pay for it, it was his legal duty to forbid its construction, or at least give notice that he would not be chargeable for its cost.³⁹

§22. **Mutual Promises as Consideration.**—A promise for a promise—where one agrees to do a thing named if another will do a certain other thing named, which the latter agrees to do.—is a sufficient consideration.⁴⁰

³⁶ Freeman v. Smalley, 38 N. J., Law, 383.

³⁷ Greenabaum v. Elliott, 63 Mo., 25.

³⁸ Braithwaite v. Johnson, 20 John, 28.

³⁹ Cincinnati Ry. v. Densky, 51 Fed. Rep., 738.

⁴⁰ This was treated under the section on Kinds of Consideration, ante §13, but see McNish v. Reynolds, 95 Pa., 483; Greve v. Ganger, 36 Wis., 369; Coleman v. Eyre, 45 N. Y., 38.

§23. **Unreal Consideration.**—Before leaving this subject there remains to be pointed out certain semblances of consideration, that is to say certain factors which, though having a bearing upon a contract and to some extent being its basis, yet does not constitute a legal consideration, and which the courts have held insufficient to support a promise. Such factors may be termed unreal considerations. The first of these to be considered is motive. Cases have sometimes arisen in which there has been an attempt to substitute motive for consideration. These are cases in which a party has promised to do a thing, not because it would be a benefit to himself, but because he wanted it done, or thought it ought to be done. The confusing of motive and consideration gave rise to the view, at one time maintained, that a moral obligation would support a promise. The existence of natural affection has in many instances furnished a motive for a promise, but is, nevertheless, not in law, a consideration. At one time the courts held that if A made a promise to B to do something for the benefit of B's son, the nearness of relationship would enable B's son to sue upon the contract although he was not a party to it. This is not now the case.

One who is not a party to a contract is not entitled to sue upon it on account of nearness of relationship to one of the contracting parties, even though the contract has been made for his benefit. An unreal consideration also arises when one promises to do what he is already legally bound to do, for in such a case the promisee would receive nothing more than he was entitled to. Thus, a promise to surrender stolen property is no consideration for a promise to pay money, inasmuch as the holder of stolen property is already legally bound to surrender it.⁴¹ On the same sustaining principle a promise to pay a witness more than his legal fees cannot ordinarily be enforced.⁴² But if a witness agrees to remain where service of summons can be more readily had upon him, or to attend without summons when only his deposition might otherwise have been obtained, there is then a legal consideration for such a promise. A public officer cannot legally receive any other consideration for the performance of a public duty than the compensation

⁴¹ Worthen v. Thompson, 54 Ark., ⁴² Dodge v. Stiles, 26 Conn., 423.
151.

allowed by law. This is an ancient principle, and it has been steadily adhered to as being necessary to save the community from extortion and oppression.⁴³

It has been held that a watchman employed by a city cannot claim a reward for the arrest of a criminal inasmuch as he did nothing outside his duty as a watchman.⁴⁴ However, the performance by any public officer of services he is not bound to render, may become the subject-matter of contract. The rule that neither the promise to do nor the actual doing of that which the promisor is by law, or by subsisting contract, bound to do, will support a promise in his favor, is elementary law.⁴⁵ For instance, for a mortgagor to surrender mortgaged premises after default in the mortgage so as to save the mortgagee trouble in getting possession of the property will not support a promise from the mortgagee given in consideration of the mortgagor so doing.⁴⁶ A case may, however, be taken out of this general rule by contingencies which release one party to the contract from his legal obligations to perform according to stipulated terms; in which case the new promise rests on a valid consideration and will be binding.⁴⁷ In the case last cited the unforeseen discovery of quicksand in the performance of a contract for ordinary excavation, was held to properly support a new consideration given for having the work continued under the added labor and expense made necessary by the quicksand. An action cannot be sustained upon the nonperformance of acts which another person is bound to do, as such rule might subject persons having obligations to many annoyances. But when there is a promise to give recompense for such performance, it ratifies the act done and is binding.⁴⁸

§24. **Impossible Consideration.**—Another semblance of consideration arises when there has been a promise to do something legally impossible; or where the promise is so vague that it is impossible to secure its performance. Legal impossibility at the time the contract is made, to do the thing promised, renders it void. When a person in custody of his creditor's bailiff agreed that in considera-

⁴³ *Kick v. Merry*, 23 Mo., 72.

⁴⁴ *Pool v. Boston*, 5 Cush., 219.

⁴⁵ *Esterly Machine Co. v. Pringle*, 41 Neb., 265.

⁴⁶ *Wendover v. Baker*, 121 Mo., 273.

⁴⁷ *Meech v. City of Buffalo*, 29 N. Y., 198.

⁴⁸ *Doty v. Wilson*, 14 Jonns., 378.

tion of the bailiff's discharging him from the debt he would do certain work, which the bailiff accepted, the court held that the promise was void and hence unenforceable, inasmuch as it was legally impossible for the bailiff to discharge his master's debt.⁴⁹ (When continuance of work on a building is forbidden by an inspector authorized by law, for a defect not caused by the contractor, further performance of the contract becomes an impossibility and the contractor cannot be held to the fulfillment of his contract until after the proper official consent is given.⁵⁰ In cases where complete performance becomes impossible by act of law, the party doing the work is entitled to recover for that part of it which he has done.⁵¹)

Contracts for personal services are subject to the implied condition that the party to perform shall remain alive and in sufficient health to carry out his agreement.⁵² An agreement to work on a farm is revoked by illness.⁵³ So, also, under like circumstances, an agreement to render legal services.⁵⁴ However, an impossibility of performance caused by the promisor himself constitutes a breach of contract for which he is liable.

Lastly, a consideration may be unreal because of impossibility, in case where the promise is so vague as to be unenforceable. Thus, in an action upon a promissory note the defendant set up a promise, made by his father, the plaintiff, to whom the note was given, that he would release him from all liability on the note upon his ceasing to make certain complaints that he had not enjoyed advantages common to the other children. The court said that the son's promise to do so was too vague to support the promise of discharge of the debt and ruled accordingly.⁵⁵

§25. **Failure of Consideration.**—Where the consideration of a contract fails the party to whom such consideration ran cannot be held to fulfill his part of the agreement.⁵⁶ For example, if a man purchases a horse which it turns out had been previously stolen, and the owner from whom it was stolen, upon proper proof of ownership, regains the

⁴⁹ *Harvey v. Gibbons*, 2 Lev. 161.

⁵⁰ *Heine v. Meyer*, 61 N. Y., 171.

⁵¹ *Jones v. Judd*, 4 N. Y., 412.

⁵² *Green v. Gilbert*, 21 Wis., 395.

⁵³ *Dickey v. Linscott*, 20 Maine, 453.

⁵⁴ *Coe v. Smith*, 4 Ind., 79; *Evans v. Wood*, L. R., 5 Eq. 9.

⁵⁵ *White v. Bluett*, 23 L. J. Exch., 36.

⁵⁶ *Rice v. Goodard*, 14 Pac. Rep., 293.

animal from the purchaser, the latter cannot be compelled to pay for the horse if he has not already done so; and if he has he may legally recover, from his vendor, the amount paid. This, because the consideration for his promise to pay—or for his payment—has failed.

Such a case is an illustration of what is termed a total failure of consideration. Where such failure is only partial then the injured party's remedy is only proportionate to such failure, provided the consideration and the promise can be divided.⁵⁷

In order for failure of consideration to render a contract wholly or partially void, as the case may be, it is necessary that a mistake as to same have been in the minds of the contracting parties, and the failure must have been in existence at the time the contract was made.

⁵⁷ Gibbons v. Pilke, 37 Mich., 380 .

QUIZZER

CONSIDERATION

- 1- §9. Is a mutual intention to form a contract itself sufficient to do so?
- 2- If not, what other element is essential?
- 3- Upon what essential is every simple contract based?
- 4- Define the consideration of a contract.
- 5- What does consideration mean?
- 6- Give illustration of some common forms of consideration.
- 7- What two essentials are necessary in every form of consideration?
- 8- What is meant by a "legal" consideration?
- 9- What relation must the consideration bear to the time of the promise given therefor?
- 10-§10. What is the legal effect of affixing a seal to a contract?
- 11- What is the chief practical legal benefit of seals?
- 12- What does a seal on a contract import?
- 13- Can an instrument under seal be enforced if no consideration was in fact given—and why?

- 14-§11. What is necessary to the validity of all contracts?
15- Is a naked promise enforceable by law—and why?
16- Give illustration of a considerationless promise.
17-§12. Must the consideration have value?
18- Must the consideration be adequate? Why?
19- What satisfies the law with reference to consideration?
20- Give two illustrations of cases where contracts have been upheld because of sufficiency of consideration.
21- Will the courts ever inquire into the adequacy of consideration? If so, what court, and when?
22- What is the legal basis of judicial interference in any such case?
23-§13. Name the two kinds of consideration and define them.
24- What may be the consideration of a promise?
25- When is a contract said to be upon an executory consideration?
26- Give illustration of a promise as consideration for a promise.
27- What is essential in mutual promises to base a contract thereon?
28- When is a consideration said to be executed?
29- Distinguish between the two forms of executed consideration. Illustrate each of them.
30- What is meant by an “acceptance of an executed consideration?”
31- What by a consideration “executed upon request?”
32-§14. Will a past consideration support a promise, and why?
33- Define a past consideration.
34- Under what circumstances will it create a legal liability?
35-§15. What exceptions are there to the rule that a past consideration will support a promise?
36- State the case of *Lampleigh v. Braitwait*.
37- What rule does it state?
38- What other rules have been suggested in criticizing that given?

- 39- Which rule is founded on the better reason?
- 40-§16. What promises will be supported by a debt barred by the statute of limitations?
- 41- Where there is a promise to pay a debt so barred, and an action is brought thereon, upon what is the action based?
- 42- What is necessary for such a new promise to make it binding?
- 43- What is the effect of the statute of limitations upon the debt?
- 44-§17. May forbearance be a sufficient consideration?
- 45- Illustrate forbearance as a consideration.
- 46- What is an essential factor of a claim to render forbearance thereof ample consideration?
- 47-§18. Is a compromise of a claim a good consideration?
- 48- Define compromise.
- 49- When will, and when will not, part payment be a legal settlement of a claim?
- 50- What is necessary to constitute a compromise a valid consideration?
- 51- What legal effect does a bona-fide belief in one's claim have upon a compromise based on the claim?
- 52- What is the legal effect of the compromise of a claim known by the claimant to be unfounded?
- 53- Does the fixing of a time of forbearance affect the sufficiency of a promise given therefor?
- 54- If no time of forbearance is fixed, what length of time governs?
- 55- What is the status where no time is named, but actual forbearance is given?
- 56-§19. Is an existing obligation a good consideration for a new promise?
- 57- State the rule on that question.
- 58- What is the attitude of the courts towards this rule?
- 59- Give illustration of an exception thereto.
- 60- What is the effect of giving something besides money as consideration for forbearance?
- 61- What is the effect of giving additional security in such consideration? State the rule.

- 62- What is the effect of change in the manner, time or place of payment at the creditor's request, as basis of forbearance?
- 63- What principle of law underlies these and like cases?
- 64- When is an agreement not a bare promise?
- 65-§20. Define what a "composition with creditors" is.
- 66- When creditors effect a composition what is the consideration moving to and from each party thereto?
- 67- What is the legal effect of a debtor complying with a composition?
- 68- Can a composition be made between a debtor and a single creditor?
- 69- Is extension of time of payment a composition?
- 70- What would bind creditors to an agreement to extend time?
- 71- If debtor fails to keep the terms of the composition what remedy has the creditors?
- 72- Is a composition with creditors an exception to the general rule governing consideration?
- 73-§21. Is moral obligation a valuable consideration?
- 74- Can a promise to pay a debt, once voluntarily released, be enforced,—and why?
- 75- State a case where moral obligation will not compel legal liability.
- 76- What effect, if any, will an antecedent legal liability have on moral obligation as a consideration?
- 77- Can an action be maintained on an act done for the benefit of another but without his request? If so, when?
- 78- From what does the obligation arise in such cases?
- 79- Upon what principle is this rule based?
- 80- What may create a promise to pay under such circumstances?
- 81- What must one do to escape legal liability under such circumstances?
- 82-§22. Does a promise for a promise furnish a good consideration?

- 83-§23. What is an unreal consideration?
- 84- Is motive a good consideration?
- 85- What can you say as to motive as a consideration?
- 86- Does relationship to a contracting party give one a legal right to sue on a contract made by him?
- 87- Is a promise to do what one is legally bound to do a good consideration for another promise? Give illustration.
- 88- Can a witness enforce a promise to give him more than his legal fees? When?
- 89- Can an officer of the law legally receive, or legally enforce a promise to pay to him, anything beyond his legal compensation,—and why?
- 90- When may a public officer receive private compensation—and why?
- 91- Can one under contractual obligation to another enforce a promise given him upon consideration of his fulfilling such contract? Why, and illustrate.
- 92- Under what condition can a promise so made be enforced?
- 93- Can legal action be based upon non-performance of another's contract—and why?
- 94-§24. What is the effect upon a contract, of legal impossibility to fulfill it? Illustrate.
- 95- To what implied conditions are contracts for personal services subject?
- 96- Give illustrations of contract where such condition prevails.
- 97- What is the rule of liability where party himself causes the impossibility to perform his contract?
- 98- What is the effect upon a promise, of vagueness therein as affecting it as a consideration? Give illustrative case.
- 99-§25. What is failure of consideration?
- 100- What effect on a contract does failure of consideration have? State effect where failure is total and where it is partial.

- 101- Give illustration of a total failure of consideration.
- 102- What is necessary in order to give total or partial failure this effect on a contract?

I read to this place April 15-1911

LESSON 4.—

CHAPTER IV.

LAWFULNESS OF PURPOSE.

- §26. In General.
- 27. Agreements Furthering Crime or Fraud.
- 28. Agreements Furthering Prohibited Acts.
 - (a) Generally.
 - (b) Wagers.
 - (c) Usury.
 - (d) Sunday Contracts.
 - (e) Business Occupation Restrictions.
- 29. Agreements Contrary to Public policy.
 - (a) Affecting Public Service.
 - (b) Lobbying Contracts.
 - (c) Affecting Public Justice.
 - (d) In Restraint of Trade.
- 30. Effect of Illegality.
 - (a) Generally.
 - (b) Divisibility of Legal from Illegal Consideration.
 - (c) Lawful Promise for Illegal Consideration.

§26. **In General.**—Courts are instituted to carry into effect the laws of a country, and cannot, therefore, be made auxilliary to the consummation of violations of law.¹ That is to say, (the law will not sanction the carrying out of unlawful objects and will not enforce agreements having such purpose in view, or the enforcement of which would work such a result.)

(Accordingly any act which violates the law, either because it is evil in itself or because it is prohibited by statute; and any act which is in aid of, or auxiliary to, such evil, or such prohibited act, cannot be made the basis of a legal contract.² Acts which are indictable, those subject to a penalty or forfeiture, or those in any other manner the subject of prohibitive legal rule are included in this class.³)

Unlawful agreements may be broadly classified as agreements in violation of positive law, and agreements contrary to public policy. It is not possible always to distinguish absolutely between the two classes and for this reason the classification made is to be regarded as for convenience in discussion.

§27. **Agreements Furthering Crime or Fraud.**—Although it seems unnecessary to do so, yet it is proper to

¹ Bank of United States v. Owens,
2 Peters, 527.

v. Nichols, 12 La., 398; Petersen
v. Christensen, 26 Minn., 377.

² Bishop on Contracts, 471; Reynolds ³ Cannon v. Boyce, 101 U. S., 508.

state that an agreement to commit a crime or any unlawful offense, is illegal.⁴

Thus, any agreement to carry out an object in itself lawful, by means of fraud, trespass, breach of trust or breach of contract is unlawful and void. (Such acts, even though not of necessity criminal, are nevertheless contrary to positive law.⁵) Other agreements that are void because they are based upon a civil wrong are agreements in fraud of creditors. If, in order to secure a compromise with his creditors, a debtor secretly promises one or more of them to pay him or them more than the others, the agreement is void, as in fraud of such others. (Such a stipulation by a creditor for a preference is entirely void, and, according to some courts, he not only loses his preference but the benefit of the compromise.⁶) (However, the New York courts hold that only the secret agreement is void, and that the creditor is entitled to the benefit of the general compromise.⁷) (When property is offered for sale at public auction, an agreement to secure fictitious bids and thus increase the price is a fraud on the buyer and no legal rights can arise from it, as against such buyer if he afterwards refuses to honor his bid.) (Any person so employed to make false bids cannot recover on a promise of compensation therefor made to him.) (The purchaser's bid in such a case is voidable on his part.) (This, however, is not because of any illegality in the contract itself, but because of the fraud practiced upon him.) (It is worth while here to note the distinction between fraud and illegality.) Inasmuch as fraud is a civil wrong, any agreement to commit a fraud is illegal and the contract for the commission of such a fraud is void for illegality.) But as between the parties to the fraudulent contract, the fraud of the one makes the consent of the other unreal, and therefore the defrauded party may avoid the contract if it has not been executed. In other words, if A fraudulently induces B to make a contract, B's consent is not legally genuine, because of A's fraud, and the contract is voidable. If A and C enter into a contract for the purpose of defraud-

⁴ Clement's Appeal, 52 Conn., 464; Commissioners v. McComb, 19 Ohio St., 320.

⁵ Gray v. McReynolds, 65 Iowa, 461; Woodstock v. Extension Co., 129 U. S., 643; Materne v. Horwitz, 101

N. Y., 469.

⁶ Kullman v. Greenebaum, 92 Cal., 403; O'Shea v. Oil Co., 42 Mo., 397.

⁷ Hanover Bank v. Blake, 142 N. Y., 406.

ing B, the contract is void because its purpose is to commit an illegal act.

§28. **Agreements Furthering Prohibited Acts.**—(a) **Generally.**—To determine whether a contract is prohibited by statute, the intention of the legislative body enacting the statute must be ascertained as definitely as possible. (If the statute clearly is intended to prohibit certain acts, then any agreement involving those acts is illegal.) If, however, the statute merely imposes a penalty for doing such acts there may be a doubt as to the intention of the legislature to prohibit the acts penalized. There are in such cases two indications of the legislative intention. One is the purpose of the penalty. If it is in the interest of public policy, or to protect people from fraud, or to promote public safety, health or morals, the purpose is to prohibit. But if it is enacted for revenue purposes only a contract in violation of the statute is merely penalized and is not prohibited. A further important indication is the recurrence of the penalty. (Where the penalty is visited upon every breach of the statute, it cannot be doubted that the act penalized is to be regarded as illegal, and a contract based thereon will be void.) The rule upon this subject may be briefly stated as follows: [Where a penalty is imposed upon any particular act, it may be assumed, prima-facie, that any contract violating that statute is illegal and void; but if it appears that the penalty is inflicted for revenue instead of for the protection of the public, it is possible that the act penalized is not intended to be prohibited.⁸]

(b) **Wagers.** (A wager is a promise to transfer money or property upon the determination or ascertainment of an uncertain event.) An event may be uncertain because it has yet to occur, or because its outcome is not known by the parties. In the latter case the uncertainty exists not in the fact itself, but in the minds of the parties. It is sometimes difficult to distinguish a wager from a condition. For instance: A gave his note in payment of land, promising to pay \$900 if cotton should be 8 cents a pound by the first of October, and \$500 if it should not. The court held that the

⁸ Sandage v. Mfg. Co., 142 Ind., 148;
Bowditch v. Insurance Co., 148
Mass., 298; McKeever v. Beacon,

101 Iowa, 173; Bisbee v. McAllen,
39 Minn., 143; Brown v. Duncan,
10 B. & C., 93.

agreement was not a bet on the price of cotton inasmuch as the parties had an interest in the contingency, and said "The defendant purchased the cotton at the lowest price, unconditionally, but agreed to pay a larger sum if the value should be enhanced by the increased value of its product."⁹

(The mere fact that a contract is a wager does not make it invalid.) It is only certain contracts of that kind that are prohibited. (For example, contracts of insurance are wagering contracts; but they are upheld.) The man who bets against a horse in a race is simply in the same position as a man who bets upon the safety of a building from fire. (The law forbids a party to make a contract of insurance unless he has an insurable interest.) (Therefore contracts in violation of this rule are sometimes called wagers while contracts complying with it are called contracts of indemnity.) However, both are, strictly speaking, wagering contracts, the only distinction between them is that one is not permitted by law, while the other is. The discussion of what is an insurable interest must be left for the chapter on insurance. Agreements for the sale of grain or stocks are gambling contracts if the parties do not intend an actual delivery, but agree, instead, that at the time fixed for delivery, they will settle by one paying the other the difference between the market price at that time and the price agreed upon. These transactions are nothing more than bets on the future price of certain articles and are illegal, generally, without reference to any statute. (The intention to wager must exist in the minds of both parties.) If one has in mind a bona-fide sale, he may enforce the contract, although the other party has in mind only a wager. (It is immaterial whether the seller is in possession of the article sold at the time the agreement is made.)

(If, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the

⁹ Ferguson v. Coleman, 3 Rich., Law (S. C.) 99.

contract a wagering contract.) If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, simply because one or both of the parties may intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract itself. "To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise, nor the other to receive it and to pay the price, but the settlement shall be made by a payment of the difference in price."¹⁰

(c) **Usury.**—As illustrations of objects illegal by reason of positive law, a great number of particular agreements may be named. At common law, a man might contract for any rate of interest that the borrower might be willing to give; but in order to protect borrowers from extortion, most of the states have enacted laws which prescribe a maximum legal rate of interest. Charging in excess of such maximum rate is usury. The penalty for violating these statutes varies in different states. In some, only the excess of interest over the legal rate is forfeited. In others, the entire interest; again three times the interest; and in still others the whole debt is forfeited. (It has been said that in order to constitute usury, there must be a lending of actual money with a provision for its return, an agreement for a greater interest than the legal rate, and an intention to accept such excessive interest.¹¹

A loan of chattels for an amount more than the legal rate of interest on their value is not usury. Neither is the purchase of a note after delivery, at a discount greater than the legal rate of interest, as there is no loan of actual money in either of these cases.¹²

However where paper is discounted merely to disguise

¹⁰ Harvey v. Merrill, 150 Mass., 1.

¹¹ Balfour v. Davis, 14 Ore., 47.

¹² Holmes v. Bank, 53 Minn., 350;
Chase v. Farout, 25 N. Y., Sup.,

447; Dickerman v. Day, 31 Iowa,
444; Truby v. Mosgrove, 118
Pa., 89.

a loan, the decision of the courts may be different.¹³ If a person agrees to pay a sum in excess of lawful interest if he does not repay the principle when it is due, the excess amount may be regarded as a penalty since it may be avoided by prompt payment.¹⁴

(Compound interest is interest on interest.) Charging such interest is, according to the majority of courts, not regarded as usury.¹⁵ Some courts, however, forbid compound interest on the ground that it is usurious.¹⁶ (Provision in a note for attorney's fee in case of collection by suit is not usury.¹⁷)

Nor is the payment of a broker's commission, or other expense for procuring a loan.¹⁸ According to some courts, such a charge may be made by the lender himself. (However, the exaction of a bonus by a lender may constitute usury.²⁰) The payment of a bonus by a borrower to either his own or the lender's agent is not usury as it is not part of the sum paid for the use of the money.²¹ (Usury will taint a note given in renewal of a usurious note though the new paper calls for only the legal rate of interest.²²)

(d) **Sunday Contracts.**—(At common law there was no distinction between contracts made on Sunday and those made on any other day.) Most states, however, now have statutes upon the subject. The scope of these statutes varies with their language. In some states, all Sunday labor and business is prohibited, while in others only servile labor, and work pertaining to a man's occupation. All such statutes except, from their operation, acts of charity or of necessity. (Necessity in this instance means the propriety of the work done under the circumstances of the case.²³) When the terms of a contract are decided on Sunday, but the contract itself is not made until a week day, the law is not violated.) (A promissory note signed on Sunday and delivered the following day, is valid, since it does not become a binding legal contract until delivery.²⁴) (There is consid-

¹³ Truby v. Mosgrove, 118 Pa., 89;

Clafin v. Boorum, 122 N. Y., 385.

¹⁴ Fisher v. Anderson, 25 Iowa, 28;

Ins. Co. v. Westerhoff, 58 Neb., 379.

¹⁵ Gilmore v. Bissell, 124 Ill., 488;

Brown v. Bank, 86 Iowa, 527.

¹⁶ Young v. Hill, 67 N. Y., 162.

¹⁷ Dorsey v. Wolff, 142 Ill., 589.

¹⁸ Fowler v. Trust Co., 141 U. S., 411;

Merck v. Mtg. Co., 79 Ga., 213.

¹⁹ Ammondson v. Ryan, 111 Ill., 506.

²⁰ Harris v. Wicks, 28 Wis., 198.

²¹ Grieser v. Hall, 56 Minn., 155.

²² Cottrell v. Southwick, 71 Iowa, 50.

²³ Love v. Wells, 25 Ind., 503.

²⁴ Bell v. Mahin, 69 Iowa, 408.

erable conflict as to whether a contract entered into on Sunday can be made valid by subsequent ratification. Some courts take the position that there is no contract to ratify; and this appears to be the prevailing rule. However, when the ratification consists of a subsequent delivery of goods, there is a tendency to take such cases out of the rule and hold the parties liable on the implied promise arising from the acceptance of the goods.)

(e). **Business Occupation Restrictions.**—There are many statutes requiring certain business and professional men to procure licenses, or certificates, before engaging in their occupations. The purpose of these statutes is to protect the public against incompetence on the part of professional men, and against the sale of spurious and adulterated articles, and also to restrict certain classes of business. (Teachers, physicians, lawyers, brokers, conveyancers, innkeepers, plumbers, auctioneers, pedlars, etc., are examples of the classes of callings coming within the statutes referred to.) Any such person not complying with these statutes cannot recover for services rendered in his vocation.

Where the sale of intoxicating liquor is prohibited by statute, an agreement to sell or the sale of such goods, is invalid. They are invalid also when the statute is not prohibitory, but merely imposes a penalty for conducting the business without a license. (The prevailing holding of the courts is that any such sale without a license is illegal; and accordingly that recovery cannot be had by law for money due on such sales. Associated with these statutes are others which regulate the management of places where certain businesses are done.) For example, where there is a statute prohibiting the conducting of a billiard or pool hall in connection with a saloon, a carpenter cannot recover for services in constructing furniture for such a hall.²⁵

§29. **Agreements Contrary to Public Policy.**—Such contracts are void and illegal although the acts intended may not be in violation of any statute or of the common law. It is impossible to classify definitely the agreements that may be contrary to public policy, consequently the test of public policy must be applied to each case indi-

²⁵ Spurgeon v. McElwain, 6 Ohio, 442.

vidually. There are, however, several groups into which such agreements may be readily divided.

(a) **Affecting Public Service.**—Inasmuch as the public has an interest in the execution, by public officers, of their duties, and is injured by any agreement tending to interfere with an impartial performance of such duties, any such agreements are contrary to public policy and therefore, illegal and void. Greenwood in his work on "Public Policy" says: ("Any contract to appoint one to a public office, or involving the sale of a public or quasi-public office, or to do anything in consideration of the promisee exchanging office with, or securing an office for, the promissor, or recommending him for such office, or resigning any office, is void.") This principle includes the assignment by public officers, of their unearned salaries. As Lord Abinger long ago said: ("It is fit that the public servants should retain the means of a decent subsistence and not be exposed to the temptations of poverty."²⁶) An officer may, however, assign his salary after it is due; but an assignment before it is due has been held void on the ground that one who has assigned his unearned salary is apt to be inefficient in the performance of his duties.

(b) **Lobbying and Kindred Contracts.**—A lobbying contract is an agreement for service, upon a consideration, in securing legislative action by means of personal influence upon legislators. Such a contract is plainly contrary to public policy and void. On the same principle, any promise contingent upon certain legislative action would be void inasmuch as it might be an incentive to the exercise of influence upon the legislators. For example, an agreement in consideration of \$15,000 to bring such influence to bear upon a legislature as to cause the passage of a railroad charter granting certain privileges is void.²⁷ However, lobbying contracts must be distinguished from contracts for purely personal services in connection with legislative work such as presenting evidence, preparing papers, and submitting arguments before legislative committees and the like. This class of contracts is valid and legally is no more objectionable than those for professional services rendered in any

²⁶ Foster v. Wells, 8 M. & W., 149.

²⁷ Marshall v. B. & O. R. R. Co., 57

U. S., 314; Houlton v. Dunn, 60 Minn., 26.

court. A contract to work for the passage of certain bills by a legislature, openly and without concealment of purpose or interest, has been held valid,²⁸ as has also an agreement to make a public argument before a legislature or one of its committees.²⁹

With regard to contracts which contemplate procuring contracts from departments of government, there is some difference of opinion. Some courts hold that such an agreement is illegal on account of its tendency to corrupt government; others, that although such an agreement may provide for a compensation for services in procuring such a contract, it becomes illegal only when corrupt means are employed thereunder. Agreements for services in procuring administrative action may be purely professional, as in the case of contracts to render services before legislative committees. Contracts to influence municipal and quasi-public corporations in locating their improvements, or in the performance of other corporate acts, fall within this class when they interfere with the duties of such corporations to the public.³⁰ Such contracts are generally held valid when they do not restrict the company in locating similar improvements at such other places as the public needs may require.³¹

(c) **Affecting Public Justice.**—Another group of agreements, contrary to public policy, includes such agreements as tend to pervert or obstruct public justice. Any agreement to influence the testimony of a witness, whether by making his compensation contingent on the outcome of the suit, or by suppressing part of his testimony, is illegal and void, regardless of any lack of bad faith of the parties thereto, or of the fact that no injury has resulted thereby. The most common example of such agreements are those designed to stifle criminal prosecutions. Such contracts are void, both on account of being against public policy and because they themselves constitute a crime. However, this rule must be taken subject to this exception, that where civil and criminal remedies coexist, the offense may be compromised when the injured party can recover damages. If,

²⁸ Miles v. Thorne, 38 Cal., 335.

²⁹ Bryan v. Reynolds, 5 Wis., 200.

³⁰ Doam v. Chicago City Ry. Co., 160 Ill., 22; Reed v. Johnson, 27

Wash., 42.

³¹ Louisville etc R. Co., v. Summer 106 Ind., 55; Texas etc R. Co. v. Roberts, 60 Tex., 545.

however, the offense is of a public nature, no valid agreement can be founded on a promise to stifle prosecution therefor.

(It is also contrary to public policy to make an agreement tending to encourage litigation.) Such agreements are usually known as maintenance or champerty. Maintenance is the encouragement and maintenance of litigation by one who has no personal relation thereto or interest therein, by aiding either party in its prosecution or defense. This definition must be qualified by the statement that the courts do not usually hold such a contract void unless it appears to be made to encourage actions or defenses which ought not to be made. Assistance rendered because of a bona-fide interest or relationship is not illegal. Champerty is the maintenance of a suit for a share of the proceeds thereof. The common law doctrine on the illegality of such agreements is not now recognized to its full extent in all jurisdictions.)

(d) **In Restraint of Trade.**—Contracts restraining one in the transaction of his business or trade, are contrary to public policy if the restraint thereby required, is unreasonable; but otherwise if the restraint is reasonable. The decisions holding such agreements void are based upon a number of reasons. The injury to the party restrained in the conduct of his business; the loss to the public of the services of men in business and professions; the prevention of competition, and the encouragement of monopoly, are the principle ones. The important question in connection with such agreements is what amounts to a reasonable restraint? ³² A restraint which is unlimited as to territory has generally been held void though some courts insist that it is valid if the circumstances of the contract are such as to make it appear reasonable. ³³ (In determining whether a restraint is reasonable the court will inquire as to the protection required by the party in whose favor it is made, and also as to its interference with the interests of the public.) It is not necessary for a tradesman whose business is limited to his own city, when selling same to bind himself not to engage in the same business anywhere within the state; and in many cases, an agreement not to engage in such business

³² *McCurry v. Gibson*, 108 Ala., 451;
Gibbs v. Consolidated Gas Co., 130
 U. S., 369.

³³ *Diamond Match Co., v. Roeber*, 106
 N. Y., 473.

again in the same city would be deemed unreasonable. It is necessary that the terms of the restraint protect the party in whose favor it is made, if possible. Anything beyond that is unreasonable and void for the reason that it tends to injure the public.

§30. **Effect of Illegality.**—(a) **Generally.**—The effect of illegality upon the validity of a contract varies according to certain circumstances. It may affect the entire contract, or only a portion of it, and the legal and illegal portions may or may not be separable. The contract itself may have for its direct object the committing of an illegal act, or its direct object may be wholly lawful though the contract itself will further an illegal purpose. Both parties may be fully aware of the illegal effect of their agreement; either or both of them may be ignorant as to this, or one party may have knowledge of the unlawful intention of the other, and at the same time be free from any purpose of furthering this intention. As in the foregoing divisions of this subject, any outline offered will be for convenience of discussion, and not because the subject is capable of accurate subdivision.

(b) **Divisibility of Legal From Illegal Consideration.**—(Whenever it is possible, the legal promises or considerations of a contract are to be separated from those which are illegal.) (Where the contract is one indivisible agreement, the illegality of any part of it will render the whole undertaking void.) (If, however, the legal can be separated from the illegal, and enforced without injustice, so much of the agreement will stand.) (The great difficulty in such cases lies in determining to what extent the parts of the agreement are separable.³⁴) (Where a number of considerations are given for the same promise, and some of them are illegal, the entire contract must be void, for it is impossible to say to what extent each consideration induced the promise.³⁵) (When a separate promise for each of several acts, or a separate price for each separate article is named, if part only of the transaction is illegal, only that part of the agreement will be affected.)

(c) **Direct and Remote Illegality.**—Where the direct

³⁴ Handy v. Pub. Co., 41 Minn., 188; 639.

McMullen v. Hoffman, 174 U. S., ³⁵ King v. King, 63 Ohio St., 363.

object of a contract is an illegal act, the contract is void irrespective of the knowledge or intention of the parties, for the reason that ignorance of the law excuses no one. (Where the direct object of the contract is lawful, but the intention of both the parties is unlawful, the agreement is void.) For example: (When a party sells goods which he knows are to be used unlawfully, if he does any act in furtherance of the illegal design, his contract of sale will be void.) (If, however, he merely knows of the unlawful purpose without furthering it, the contract will be valid.) The same rule prevails where money instead of goods is furnished and subsequently used unlawfully. Where the illegal act is completed, however, it has been held not to avoid the promise. For example, in Pyke's case, the court held that money loaned to pay lost bets could be recovered, as "the illegal act had been carried out before the money was lent," and that case was an entirely different thing from a loan of money to enable a man to make a bet.³⁶ Where unlawful intention is in the mind of one party only, the innocent party may, at his option, avoid the agreement or enforce it. An example of this exists where an agreement is made involving a future delivery in which one party intends a bona-fide sale and the other only a speculation in prices.

(d) **Lawful Promise for Illegal Consideration.**—

Where a promise has been given to pay money that is due, or that will become due, upon an unlawful transaction, its validity depends largely upon whether the transaction is illegal or merely void. (Where an object is illegal, a promise given in consideration of it is based on an illegal consideration, and this illegality taints the entire transaction and renders it invalid. Where the promise is in the form of a negotiable instrument, a question also arises as to its value in the hands of an innocent third party. A negotiable instrument given for an illegal consideration, which reaches the hands of a bona-fide holder for value, may be enforced provided that the contract is not illegal by virtue of a statute which declares that such an instrument so given shall be void.³⁷ Where in such a case it appears that the instrument was tainted with illegality, the holder thereof will be obliged to show that he paid value for it and that he had no

³⁶ Pyke's Case, 8 Ch. Div., 756.

³⁷ Harper v. Young, 112 Pa., 419.

knowledge of the illegality. Where, however, the transaction is void without the consideration being illegal, a promise to pay money therefore has the same standing as if it were made upon no consideration at all. If it is in the form of a negotiable instrument, it may be enforced by a bona-fide holder for value, the presumption being that a party in whose favor the instrument is endorsed is such a holder without notice of the lack of consideration.³⁸

³⁸ Harger v. Worrall, 69 N. Y., 317.

QUIZZER.

LAWFULNESS OF PURPOSE.

- 1-§26. Will courts enforce contracts to violate the law—and why? *No*
- 2- State what acts cannot be made the basis of a legal contract? *An act that violates the law*
- 3- Can indictable acts, or those subject to penalties or forfeitures, or those otherwise prohibited, be made the subject of contract? *No*
- 4- How can unlawful agreements be broadly classified?
- 5-§27. What is the nature of a contract agreeing to commit an unlawful offense? *illegal*
- 6- Name some acts not subject to contract for this reason.
- 7- What is the nature of a contract based upon a civil wrong—and illustrate.
- 8- Can a contract whereby, in a composition with creditors, one receives more than the others, be legally enforced—and why? *No*
- 9- What can you say as to the nature of an agreement to secure fictitious bids at an auction? *Fraud*
- 10- Can one employed to make such bids, legally recover the agreed pay therefor—and why? *No. illegal*
- 11- What effect upon the bid of the successful bidder at an auction, has fictitious bidding? *Voidable*
- 12- State fully the distinction between fraud and illegality in such matters.

- 13-§28. How is it ascertained whether a contract is prohibited by statute?
- 14-(a) Can contracts involving prohibited acts be enforced?
- 15- Can contracts involving acts for which a statutory penalty is imposed be enforced?
- 16- How is a legislative intention covering these two classes of acts determined—state fully?
- 17- State accurately the rule covering this subject.
- 18-(b) Define a wager.
- 19- Can a wager be readily distinguished always from a condition in a contract—illustrate.
- 20- Does the mere fact that a contract is a wager make it invalid? *No*
- 21- Name some contracts that are in fact wagers that are not illegal for that reason. *Insurance*
- 22- When are contracts for the sale of grain or stock illegal—and why? *When goods are not to be delivered*
- 23- What effect upon a wagering contract has the fact that one of the parties intended a bona-fide sale? *0*
- 24- What factor in a contract covering merchandise to be delivered at a future date makes it a wagering contract—and what obviates this?
- 25- What is sufficient in a contract to constitute it one of wager?
- 26-(c) What limit, at common law, was there upon the interest rate chargeable? *No limit*
- 27- Has the old rule been changed—if so, why—and to what extent? *Yes. very great extent.*
- 28- What is charging interest above the legal rate called? *Usury.*
- 29- Is there any penalty for such over-charge? *yes*
- 30- What is necessary to constitute usury?
- 31- Is a loan of chattels at a rate more than the legal interest on their value would be, usury? *No.*
- 32- Is the purchase of a note at a discount greater than the legal rate, usury—and why? *No*
- 33- What is the effect where commercial paper is discounted at such rate merely to disguise the excess interest?
- 34- Define compound interest, and is charging such interest usury? *No*

- 35- Is your answer to the last part of the foregoing question true in all states? *no*
- 36- Is a provision for an attorney's fee in a note, in case of suit thereon, usury? *no*
- 37- Is the commission charged by a broker for obtaining a loan for another, usury? *no*
- 38- Does the exaction of a bonus by a lender constitute usury? *it may.*
- 39- Is payment of a bonus by a borrower, to his own or the lender's agent, usury? *no*
- 40- Will usury taint a note at legal interest given in renewal of a usurious note? *yes*
- 41-(d) What distinction at common law was made between contracts made on Sunday and those made on other days? *no distinction*
- 42- How is this subject regulated at present? *by statute*
- 43- State some statutory differences, as to contracts prohibited on Sunday.
- 44- What contracts are excepted from the operation of Sunday law statutes? *Charity - necessity.*
- 45- Where the terms of a contract are decided on Sunday, but the contract is not actually made until a week day, is such contract valid? *yes*
- 46- Is a promissory note signed on Sunday and delivered the following day valid—and why? *yes*
- 47- Can a contract made on Sunday be validated by subsequent ratification—state fully? *disputed?*
- 48-(e) What can you say concerning statutes restricting business occupations?
- 49- What classes of persons, generally, come within such restrictions? *Professionals, doctors - plumbers - construction men.*
- 50- Can persons not complying with such statutes legally recover upon contracts made without complying therewith? *no*
- 51- Is an agreement to sell intoxicating liquor, where its sale is prohibited by statute, or where the statute imposes a penalty for conducting such business without license, valid? *invalid*
- 52-§29. What can you say as to the legality of contracts contrary to public policy? *void & illegal*

- 53-(a) Are contracts tending to interfere with the impartial performances by public officers, of their duties, valid? *no*
- 54- State some types of contracts of this character which are invalid. *assignment of salary before due*
- 55-(b) Define a lobbying contract.
- 56- Are such contracts legal—and why? *no*
- 57- What contracts designed to influence legislation are, and what are not, legal? *evidence - papers - legal lobbying - void*
- 58- Are contracts to secure administrative action in public offices valid?
- 59- Is a contract to influence a municipal, or a quasi public corporation contract valid?
- 60(c) Are contracts tending to pervert or obstruct public justice valid? *no*
- 61- What contracts with witnesses are, and what are not, valid?
- 62- Is a contract to stifle criminal prosecution valid? *no*
- What exceptions if any, are there in this matter?
- 63- Is a contract tending to encourage litigation valid—and why? *no*
- 64- Define the term “maintenance,” and are contracts therefor valid?
- 65- What is “champerty”; and are contracts therefor legal?
- 66-(d) What contracts in restraint of trade are legal; and what are illegal?
- 67- State the reason upon which such agreements are held to be void.
- 68- What measure of restraint of trade in a contract will be held valid?
- 69- In determining this question, what inquiry will the court make?
- 70- Is a restraint, unlimited as to territory, void?
- 71- Can a contract not to enter into business anywhere within a named state be enforced—and why?
- 72- What is the limit of restraint in behalf of the party benefited thereby which will be upheld?
- 73-§30. What is the effect of illegality upon a contract
- (a) and is this effect always uniform?
- 74- Distinguish the various limits of the effect of illegality in contracts.

- 75-(b) Can the legal consideration be divided from the illegal consideration in contracts where both appear? *yes when possible.*
- 76- State fully when such separation can and cannot be had.
- 77-(c) Where the direct object of a contract is illegal what effect does this have on the contract? *it is illegal*
- 78- Same, in cases where the direct object is lawful but the intention of the parties is unlawful? *void*
- 79- Can a party collect for goods sold which he then knew were to be used unlawfully? *no*
- 80- Can money loaned, knowing it is to be used in gambling, be recovered legally—and why? *no*
- 81- Can money loaned to pay a gambling debt already incurred be so recovered? *yes*
- 82-(d) How is the validity of a promise to pay money upon an unlawful transaction determined? *illegal money*
- 83- Where such promise is in the form of negotiable paper, what additional question arises? *?*
- 84- When and when not can the innocent holder of negotiable paper given for an illegal consideration collect same?
- 85- What is the rule where a transaction is void but the consideration thereof is legal?

Read to here - 4-22-11

*Questions answered and marked
April 6 1911*

LESSON 5.—

CHAPTER V.

OFFER AND ACCEPTANCE

- §31. Mutuality of—Expressed by Words.
- 32. Same—Expressed by Conduct.
- 33. Same—Illustrations.
- 34. Offer Must be Known by Acceptor.
- 35. Offers Partly Communicated.
- 36. Acceptance Must be Communicated.
- 37. Acceptance Must Coincide With Offer.
- 38. Offer and Acceptance by Mail.
- 39. When Acceptance is Complete.
- 40. Acceptance Must Not Modify Offer.
- 41. Conditional Acceptances.
- 42. Ancillary Matters in Acceptance.
- 43. Lapsing of Offer.
- 44. When Offer is Revocable.
- 45. Notice of Revocation Must be Communicated.
- 46. "Refusals," and Their Revocation.
- 47. By Whom Offers Must be Accepted.
- 48. Auctions.
- 49. Public Offers and Bids.
- 50. Offer Must Concern Contractual Relations.
- 51. Conflict of Laws.

§31. **Mutuality of—Expressed by Words.**—Every contract reduced to its actual inception arises from the acceptance of an offer. Every expression of mutual intention is reached by one party making an offer and the other party accepting it; the legal result being an obligation, or legal tie, binding the parties to the performance of the conditions thus agreed to. Such an expression of mutual intention can usually be reduced to the form of a simple question and answer. For instance: A says, "I will sell my horse for \$50., and B says, "I will take him." Or B says, "I will give you \$50 for your horse. Will you take it?" and A says, "I will." To the same effect, legally, although in a different manner, the act of a merchant in displaying his goods at a stated price, and that of a customer taking them to the wrapping counter, or saying that he will take such goods, indicating them amount to an offer and acceptance and hence constitutes a legal contract. A contract made under the last condition is sometimes called a tacit contract.

§32. **Same—Expressed by Conduct.**—From the last illustration given it will be seen that both an offer and its acceptance may be made by conduct instead of by words. Sending goods in response to an order therefor is an accept-

ance by conduct, of the offer to buy contained in the order.) A common illustration of this class of contracts is offered by the sending of goods by error or otherwise, to one who has not ordered them and their use or consumption by the person to whom they were delivered. The sending or delivery is the offer, the use or consumption is the acceptance, legally implying a promise to pay the market price therefor.) Again, a person allows another to perform services for him under such circumstances that such other person could not reasonably be supposed to be doing the work for nothing; the former's acquiescence in receiving the services, constitutes an acceptance of the services done, and he will be held liable to pay for them.) A ordered of B a publication which was to be completed in twenty-four numbers; he refused to accept more than ten numbers; (it was held that A's acceptance of the ten numbers received, created a promise to pay for them, although he was not liable on his promise to take the entire number.¹

However, in such cases in order to make a valid contract there must be a definite request, actual or implied, for the work to be done and not a mere inquiry whether the other would be willing to do it, or willing to have it done. Acceptance of proffered work or service constitutes a legal promise to pay for it. (Where silence is relied upon as an acceptance, it must be such silence as constitutes an assent.) (If the nature of the contract, or of the offer is such that acceptance should be definitely expressed, either in spoken or writing speech, then acceptance by silence will not be sufficient. When acceptance is by conduct, the contract is implied from the conduct of the parties in contrast to those instances where the contract is expressed by words. *See*

§36. **Same—Illustrations.**—An offer and its acceptance may be made in various forms. The presence of a street car on the street is an offer by the company to carry passengers, and when a person enters the car, he accepts the offer and promises to pay the fare. This is an offer of an act for a promise. If a person has lost property and offers a reward for its return, it is a promise offered for an act. If A promises to B a hundred dollars for services which B promises to perform, a contract arises from the offer of the

¹ Fogg v. Portsmouth Athenaeum, 44 N. H., 115.

promise and the giving of a promise in return. This is a case of a promise offered and a promise accepted.

§34. **Offer Must be Known by Acceptor.** (To be effectual an offer must be communicated to the offeree, or the doer of a service within the offer, for without such communication, there could be no union of minds in mutuality of assent, and therefore no contract. For this reason a person who performs a service for which a reward has been offered, but who at the time of doing the service, does not know of the offer, cannot legally claim the reward.) In the case of *Fitch v. Snedaker*,² a sheriff offered a reward for information leading to the arrest and conviction of a murderer. The plaintiff gave the information which led to the arrest and conviction of the guilty party but at the time he did so, he did not know of the offered reward, and the court in a suit brought to recover it held that he could never have accepted it, not knowing it had been made, and therefore was not entitled to it.

(A frequently cited illustration of this principle is the case of a captain who was engaged to command a ship. Before the end of the voyage for which he had contracted he gave up his command but helped work the vessel to her destination. It was held that he could not recover for the services rendered after relinquishing his command, inasmuch as his offer to perform them had never been communicated to the owners of the ship and they had had no opportunity either to refuse or to accept same.³) (For the same reason it has been held that the person who saves the property of another from destruction by fire without the owner's knowledge, cannot recover for his services.⁴) (One, Bartholomew, had a stack of wheat in a field owned by Jackson, and which he promised Jackson he would remove by a certain time in order that the latter might burn the stubble.) (Jackson, relying on this promise, set fire to the stubble in a distant part of the field and afterwards finding that the stack had not been taken away moved it himself to save it from the fire. For this service he brought suit against Bartholomew for pay for this work, but the court held that as it was rendered without the request of Bartholomew, and without his knowl-

² 38 N. Y., 248.

³ Taylor v. Laird, 25 L. J. Ex., 329.

⁴ Bartholomew v. Jackson, 20 Johns (N. Y.), 283.

edge, there was no promise actual or implied on his part to pay for it.)

§35. **Offers Partly Communicated.**—In some instances the terms of an offer are left partially uncommunicated. In such cases the liability of the acceptor depends upon his knowledge of the existence of the terms of the offer. In an old English case a ticket bore on its face only the words, "Dublin to Whitehaven." The purchaser was held not to be bound by the conditions which were printed on the back of the ticket, as on the face thereof there was a complete contract, and the purchaser had no knowledge of the terms on the other side. In another instance, though, where the face of the ticket referred to "conditions on the back," and the purchaser admitted knowledge of the existence of such conditions but did not read them he was held bound thereby. In all such cases, the controlling question is whether the terms of the offer have been fully communicated to the acceptor or his attention actually called thereto. (The tendency is towards a rule holding that if one accepts a paper containing terms of offer, he is bound by the same although he may not choose to inform himself of their nature.) The rule as stated governing railway tickets applies equally to bills of lading, warehouse receipts, telegraph blanks and the like.

§36. **Acceptance Must be Communicated.**—Acceptance must be communicated to the offerer by words or conduct. A mere mental acceptance by one, of a communicated offer, does not constitute a contract. A had received from B a written agreement to pay him as sole agent, a stated commission for the sale of certain lands if made within three months. B himself sold the land within one month and A brought suit for breach of contract. It was held that inasmuch as A had failed to communicate to B an acceptance of his offer, there was no mutual obligation, and therefore that the offer might be revoked by B, which was effectually done when he himself sold the land.⁵⁴)

A party making an offer may prescribe a manner of acceptance but he cannot by the term of this offer turn the mere silence of the offeree into an acceptance. In other

* Stensgaard v. Smith, 43 Minn., 11.

words, one cannot by his own offer compel the offeree to signify his refusal thereof or else be held to have accepted it. A offered to buy B's horse, adding, "If I hear no more about it I shall consider the horse mine." The evidence showed that B had made up his mind to accept the offer but as he had not communicated his intention to A the court held that there was no contract.⁶

§37. Acceptance Must Coincide with Offer.—The effect of the due acceptance of an offer is to form a contract. It transforms the offer into an obligation that binds the parties thereto. The communication of an acceptance differs from that of an offer in that it may, or may not, consummate a contract according to the nature and conditions of the offer. An offer is not "communicated" until brought to the actual knowledge of the offeree, while an acceptance may be considered "communicated" though it has not actually come to the knowledge of the party making the offer. If the party making the offer intimates, either expressly or impliedly, that a particular form of acceptance will be sufficient to bind the bargain, it is only necessary for the party to whom the offer is made to accept in the manner indicated. Again, if the party making the offer intimates that it will be sufficient to act on it without communicating the acceptance of it to him, the performance of the consideration named in the offer will of itself constitute an acceptance without verbal notice thereof. It may be generally stated that if an offer contemplates the doing of a certain act as the consideration of the promise tendered by the offer, the performance of that act will complete the contract, unless the offer directly calls for the communication to the offer or of an acceptance.

§38. Offer and Acceptance by Mail.—If the offeror requires or suggests a particular means of acceptance, he takes the risk of an acceptance so made reaching him. A common instance of this exists when an offer is made by mail, or telegram. In such cases it is to be assumed that the acceptance may be made in the same way unless the offer expressly states otherwise. When acceptance is made in the required manner, the contract becomes instantly bind-

⁶ Felthouse v. Bindley, 11 C. B., N. S., 869.

ing, and its consummation dates from the time the accepting letter or telegram is put in the course of transmission, irrespective of its actual receipt by the other. /Where an offer is made by mail, the postoffice is regarded and is in fact the agent of the offeror, as was said in one case. As soon as the letter of acceptance is delivered to the postoffice the contract is as complete and final and absolutely binding, as if the acceptor had put his letter into the hands of a personal messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance. 7//The defense in the case cited was that there was no contract legally because the plaintiff's letter of acceptance was never received by the defendant, but the court held otherwise on the principles just stated.//In another case the defendant offered by letter sent through the mail to insure the plaintiff's house for a stated sum, and the plaintiff accepted by mail, but before his letter of acceptance reached the company his house burned. The company was held liable for the agreed insurance because the contract was completed when the letter of the plaintiff was mailed. ^s

These decisions are based on the theory that when an offer is made to one who is not in immediate communication with the offeror, the offer remains open for acceptance for such time as is prescribed by the offeror, or as may be reasonable under the circumstances for the offer to be received and passed upon by the offeree. In other words, that an offer contained in a letter remains open until the letter reaches the offeree and he has had a reasonable time to consider same and that a contract is formed the moment he accepts it, and in pursuance thereof mails a letter accordingly to the offeror.

§39. **When Acceptance is Complete.**—In case an acceptance becomes lost, or is delayed in transit, the same rule holds good, though the reluctance of the courts to apply it makes it interesting to note the steps by which it has been followed. /The principle was at first laid down that the posting of a letter of acceptance completed the contract no matter what became of the letter.//Later the English courts tried to modify this holding by saying that the contract did

^s Taylor v. Merchants Fire Ins. Co., 9 How., 390.

⁷ Household Ins. Co. v. Grant, 4 Ex., 108.

not become binding until the letter of acceptance was received, but that its operation then dated back to the date of the posting of the letter. A later case held that the contract was complete at the time of posting the letter of acceptance, but subject to the condition subsequent that if the letter did not arrive in due time, the offeror might assume that the offer had not been accepted. (However, the settled rule is as has already been made clear, that the contract is concluded by the posting of the letter of acceptance and that it is not suspended, or subject to any condition occurring after the letter is actually mailed. This rule holds good, also, and for like reasons to offers made by telegraph, cable and aerograph, and to acceptances thereof forwarded by like means.)

§40. **Acceptance Must Not Modify Offer.**—To form a contract there must be a clear proposition made by one party and clearly accepted by the other without any modification. (If the acceptance changes the offer in any respect, however small, it amounts simply to making a counter offer; it is not an acceptance which will form a contract.⁹) It has well been said that an acceptance to be good must be such as to conclude an agreement or contract between the parties on the offer made, and to do this, it must in every respect meet and correspond to the offer neither falling short of or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. (In *Jenness v. Mount Hope Iron Company*,¹⁰ the court held that a reply agreeing to take a certain number of kegs of nails less than the quantity offered by the defendant at a stated price did not constitute an acceptance of the offer and therefore entered a nonsuit against the plaintiff.) This sound and essential doctrine has, however, in some instances been carried to extremes.¹¹ (For instance, A who lived in California offered, for a price named, to sell certain land to B who lived in Iowa. B telegraphed his acceptance adding, "Money at your order at First National Bank here." On suit brought by A the court held that as the offer mentioned no place of payment, B's telegraph stating one was a conditional acceptance and not binding on either party unless accepted by A.) (In another case the plaintiff offered the defendant \$300

⁹ Potts v. Whitehead, 23 N. J., Eq., 512.

¹⁰ 53 Maine, 20.

¹¹ Sawyer v. Brossart, 67 Iowa, 678.

for two horses. Defendant replied, "You may have the horses for \$300 if you will come for them." The court said that no contract was formed as the acceptance was coupled with a new condition.¹²)

(The principle that an acceptance must meet the offer squarely and unconditionally) is well stated in *Bruner v. Wheaton*.¹³ The court therein, said: "In order that an acceptance may be operative it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. To constitute a valid contract there must be a mutual assent of the parties thereto and they must assent to the same thing in the same sense."

§41. **Conditional Acceptance.**—A conditional acceptance of an offer is a rejection of the offer. Such an acceptance is no acceptance; but merely, as before stated, the substitution of a counter offer. (A person who thus conditionally accepts an offer cannot thereafter bind the proposer by an unconditional acceptance, even though the offer has not been withdrawn.) In *Cozart v. Herndon*,¹⁴ the plaintiff, a corporation, offered to purchase of the defendant certain land for \$15,000 of its capital stock. The defendant replied that he would accept the offer, but reserved in his acceptance, all timber on the land for his own benefit. The court held that such acceptance was conditional and that the defendant was not entitled to the stock offered as stated.

§42. * **Ancillary Matters in Acceptance.**—However, the fact that an acceptance contains matters ancillary to the transaction will not make it conditional. The acceptance of a load of flour offered for sale, is not qualified because it contained an inquiry as to the form of remittance.¹⁵ In like manner, the acceptance of an offer to sell cotton has been held unqualified, although it contained directions for shipping, as the directions were entirely subordinate to the contract.¹⁶

§43. **Lapsing of Offer.**—An unaccepted offer will lapse under several conditions so that a subsequent acceptance will be ineffectual. The death or insanity of either party

¹² *Fenno v. Weston*, 31 Vt., 345.

¹³ 46 Mo., 363.

¹⁴ 114 N. C., 252.

¹⁵ *Clark v. Dales*, 20 Barb., 42.

¹⁶ *Brisban v. Boyd*, 4 Paige, 17

before an offer has been accepted will cause it to lapse, for the legal representatives of the offeror cannot be bound by an acceptance and the legal representatives of the offeree cannot accept an offer in his behalf. In accordance with the principles already stated, however, an acceptance mailed before the death or insanity of the offeror, but not received until afterwards makes a valid contract.¹⁷ An offer may also lapse because it is not accepted in the manner prescribed by the offer. A offered in writing to sell flour to B, specifying that the answer be sent by return of the wagon with which he the offer was delivered. B sent his acceptance by mail thinking that it would reach A sooner than by the wagon. It was held that A was not bound by the acceptance as it was not sent in the manner directed by his offer.¹⁸ An offer may also lapse by the passing of the time specified therein for acceptance, or if there is no time specified, by the passing of such time as is reasonable for acceptance. What amounts to a reasonable time is to be determined from all the circumstances of each case. Lastly an offer may lapse by revocation.

§44. **When Offer is Revocable.**—An unaccepted offer creates no legal rights and may therefore be withdrawn at any time before its acceptance. This is true even though there has been a promise with the offer to hold it open for a certain length of time, unless the promise was given for a consideration. If there is a consideration for the promise to hold the offer open for a given time, this, of course, of itself constitutes a contract, a failure to comply with which would give the offeree the same rights to specific performance, or an action for damages, that would arise under any other form of breach of contract. In an old English case, one, Oxley, the defendant, offered Cook, the plaintiff, a large quantity of tobacco at a specified price. Cook was asked that the offer be kept open until four o'clock of a certain day, to which Oxley agreed, and before that hour, Cook communicated his acceptance; but in the meantime, Oxley had changed his mind and refused to sell. The court held that Oxley's promise to keep the offer open was not binding for want of a consideration given him by Cook, and that the

¹⁷ Mactier v. Frith, 6 Wend., 103.

¹⁸ Eliason v. Henshaw, 4 Wheat, 225.

offer could be revoked by Oxley at any time before its acceptance. The rule thus established continues in full force today.

§45. **Notice of Revocation Must be Communicated.**— Legally speaking “communication” of a revocation of an offer differs from communication of an acceptance, in that an acceptance is “communicated” when it is put in the course of transmission, while a revocation is not communicated until it is actually received. It is possible therefore that a letter containing the acceptance of an offer made to its writer, and the notice of the revocation of such offer sent by the offeror, and posted at the same time, will result in the acceptance being effectual, as it legally became so on the posting of the letter, and the revocation being ineffective, because it was not received before the acceptance was mailed. (In case the offer and withdrawal are received in separate letters at the same time, and the acceptance of the offer was put in transmission before the letter containing the withdrawal was opened, the acceptance would form a contract.)

The rule is not so clear where the party making the offer has done some overt act which puts it out of his power to perform the contract upon acceptance, but has not communicated his revocation to the offeror. It is fairly certain that an overt act is a sufficient revocation if the person to whom the offer was made had sufficient notice of it; but it is not very clearly settled what would amount to sufficient notice. It is doubtful if the mere statement to the offeror, by a stranger to the transaction, that the party making the offer had changed his mind, would constitute proper notice to the offeree. If sufficient notice is lacking, the offer must be held to continue open, and will be turned into a binding contract by its acceptance.

In an old case, the defendant, in England, wrote to the plaintiff, in New York, offering for sale a quantity of tin, and asked for a reply by cable. The plaintiff replied at once as requested, but the defendant in the meantime had mailed a letter of revocation. The court held that both legal principle and practical convenience required that a person who has accepted an offer, not known by him to have been revoked, shall be in a position safely to act upon the

* open - public.

footing that the offer and acceptance constitutes a contract binding upon both parties.¹⁹ This decision established the rule, that, until the moment of acceptance, an offer is revocable, but that the notice of revocation must be actually communicated, and the moment of such communication is the moment of its actual receipt by the offeree. As we have already seen, where a party making an offer uses the mail as his messenger to carry the offer and bring back the acceptance, an acceptance is legally "communicated" to him when such letter is mailed and thus put in charge of his chosen means of communication, but his revocation of his offer cannot be regarded as "communicated" until it is actually delivered by his messenger to the party for whom it is intended.

§46. **"Refusals" and Their Revocation.**—A "refusal" may be defined as a promise to hold an offer open for a given time. It frequently happens that persons give what is called a "refusal" of an offer for a certain length of time. Such a promise, as we have already found, is not binding unless it is supported by a consideration. In such cases, the manner of retracting the refusal of an offer depends, to a certain extent, upon whether the parties are in immediate communication. Where such is the case the offer may be revoked at once, any time before acceptance, and the general rule seems to be that any overt act, indicating a change of intention by the party making the offer, amounts to its withdrawal. (Some courts hold this to be true even though the withdrawal is not brought to the knowledge of the other party.) Where the parties are at a distance, however, the general rule, as before stated, appears to be that the party to whom the offer is made has the right to rely upon it and to conclude the contract by accepting it at any time before actually receiving notice of its revocation.

§47. **By Whom Offer Must Be Accepted.**—It is not necessary that an offer be made to a particular ascertained person, but there can be no contract till it has been accepted by some ascertained party. (This proposition is illustrated by the general offer of a reward to the public for certain information, or for any other named service.) Such

¹⁹ Bryne v. Van Tienboren, 5 Common Pleas Div., 344.

an offer becomes a contract to pay the reward whenever any individual renders the service. The troublesome questions which arise in connection with this class of contracts come mainly from two causes, first, (where the party performing the service may not, at the time of performance, know of the offer of the reward.) Upon the question of the right to the reward under such circumstances, the courts disagree, some holding that it is not necessary that the reward should be the motive for the service rendered, but that the contract is with any person who performs the service requested. Others hold that the reward can not be recovered by a person performing the service, in ignorance of the offer, because there is lacking the mutual consent essential to the formation of a contract.

(As illustrative of the former rule, we may say that the English courts allowed a plaintiff to recover the offered reward on the ground that there was a valid contract consummated with the person who performed the condition mentioned in the advertisement.) The chief contention of the defendant in that case referred to was that the reward was not the motive of the plaintiff in giving the information, but the court held the motive was immaterial.²⁰ On the other hand, the basis of the ruling that one is not entitled to a reward, as a matter of contract,—where he performed the service in ignorance at the time, of the reward offered, we may set the case of *Fitch v. Snedaker*, wherein the court said: “To the existence of a contract there must be mutual assent, or in another form, offer and consent to the offer.” The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard?”²¹

(The second source of difficulty is presented by declaration of an intention, or statements of probable action, sent out generally by circular letter, advertisements, or other method of miscellaneous offerings.) (The acceptance of any such statements, not definitely made as clear propositions, can not result in any contractual liability.) (They must be distinguished from general, actual, definite, offers whose ac-

²⁰ *Williams v. Carwadine*, 4 B. & A., ²¹ 38 N. Y., 250.
621.

ceptance by an individual forms a contract. In the cases under consideration terms must be carefully distinguished from mere matters of inducement, for every term of an offer becomes a promise when the offer is accepted, while matters of inducement impose no liability on any one. As illustrating this distinction is the case of *Moulton v. Kershaw*,²² wherein the defendants sent a communication to the plaintiffs, saying, "We are authorized to offer Michigan salt at eighty-five cents per barrel. Shall be pleased to receive your order." The plaintiffs ordered two thousand barrels but the defendants refused to fill the order. The court held that the defendants' letter was simply an invitation to deal, and not an actual offer that could be turned into a binding contract by acceptance.

§48. **Same—Auctions.**—Some of the above distinctions arise in connection with sales by auction. An auctioneer's advertisement of a sale of goods is held not to bind him to conduct the sale at the time announced, and so, failure to do so does not make him legally liable to reimburse parties who expend money to attend the advertised sale.²³ The court said: "Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are to be withdrawn, we can not hold the defendant liable." However, an advertisement of an auction "without reserve" creates a binding promise on the part of the auctioneer to deliver the goods to the highest bidder at the sale.²⁴ This case differs from the preceeding one in that the highest bidder is a definite person who has fulfilled the terms of a definite offer, while, the attendant of an advertised sale is merely one of an indefinite number of persons who at the sale might not actually bid, and whose losses therefore cannot be definitely ascertained. When an auctioneer actually puts up property for sale and receives bids therefor, the putting up of the property is an offer, and a bid therefor is an acceptance of the offer at the price bid. Each subsequent larger bid is an acceptance by the auctioneer of the last preceeding bid, to the extent that

²² 59 Wis., 316.

Bench, 286.

²³ *Harris v. Nickerson*, 8 Queen's ²⁴ *Warlow v. Harrison*, 1 E. & E., 295.

he can be legally held thereto by the highest responsible bidder.

§49. **Public Offers and Bids for Contracts.**—To the same general effect as offers and bids at public auctions, so far as the liabilities of the offeror and the rights of the offeree—or bidder—are concerned, are the legal rules governing public offers for supplies, contracts, and the like.

Where one, by public print, or other form of promiscuous and general publicity, seeks offers for certain specified materials, or for stated work or services, requesting bids therefor, he impliedly, if not actually tenders the order or contract therefor to the one making the highest bid. Accordingly, unless the public announcement specifically reserves the right to reject bids, the highest responsible bidder can legally compel the other party to give him the order advertised. The reason for this is that such bid is an acceptance of the offer, and itself constitutes, and consummates a contract. The offer of the order, though made to the world at large, is made to an “ascertained” person the moment a responsible party puts in the best bid. Of course, where such public offer for bids is coupled with certain stated conditions, all bids thereunder are held subject to such conditions. An offer must be sufficiently definite in terms, to be capable of creating legal relations, in order for its acceptance to constitute a binding obligation. (Where one agrees to do certain work for another, for “whatever is right,” there is no contractual relation thus created sufficiently definite to be enforced by law. ²⁵)

§50. **Offer Must Concern Contractual Relations.**—An offer to be entitled upon its acceptance to be made the basis of legal rights and action if not then fulfilled, must be in relation to such matters as are subject to contractual liability. For instance, the offer of hospitality embodied in an invitation to a social function, and its acceptance by one invited, although thereby the latter may incur expense and if the function is not held he may be said to have suffered some loss or damage, cannot be made the subject of legal redress, where the invitation is withdrawn, or the function is abandoned. In other words such matters are not, generally

²⁵ Taylor v. Brewer, 1 M. & S., 290.

speaking, capable of legal recognition, for they do not constitute legal contractual relations.

§51. **Conflict of Laws.**—Where the locality of the formation of a contract is material, as very frequently is the case, it is determined by the place of the acceptance. Thus, where an offer was made in Massachusetts and accepted in Rhode Island, it was held that the contract was made in the latter state and must be determined by Rhode Island law.²⁰ This matter becomes material in determining the law by which a contract is to be interpreted and enforced, and also often in deciding upon the capacity of the parties to the contract, since the laws of different states vary on these points. The consideration of these questions will be taken up later and dealt with fully when we come to the subject of Conflict of Laws.

²⁰ Perry v. Iron Company, 15 R. I., 380.

QUIZZER.

OFFER AND ACCEPTANCE.

- 1-§31. What is the basis of every contract? *see acceptance of an offer.*
- 2- How is the expression of mutual intention usually given?
- 3- Illustrate common forms of offers and acceptances.
- 4-§32. How, other than by words, can offer and acceptance be made? Illustrate. *Tacit contracts.*
- 5- State the rule governing contracts by conduct.
- 6- When must a definite request covering contract be made?
- 7- When will silence suffice to bind one?
- 8- State the distinction between implied and expressed acceptances.
- 9-§33. Give illustrations of various forms of offers and acceptances.
- 10-§34. What is necessary on the part of the acceptor to obligate the offeror? *must accept*
- 11- Is one who performs service in ignorance of offered reward, entitled thereto? *no*
- 12- Is the rule on this point uniform? If not state different views, and basis of each. *no*

- 13- Give at least two illustrations on this point.
- 14-§35. Where the terms of an offer are only partially known to an acceptor, what is the governing rule?
- 15- What is essential on the part of an acceptor to bind the offeror to his offer?
- 16-§36. What do you know about conditions printed on railway tickets, bills of lading, telegraph blanks, and the like?
- 17- Can one bind an offeror by simply, in his own mind, accepting the offer?
- 18- What is mutually necessary between offeror and acceptor to bind both?
- 19- Cannot an offeror prescribe the manner of the acceptance of the offer?
- 20- What limit, if any, is there to such right?
- 21- Give an illustration of attempted limitations on the right of an offeree to refuse an offer.
- 22- What is the effect of due acceptance?
- 23-§37. How does a communication of an acceptance differ from that of an offer?
- 24- When is an offer not "communicated?"
- 25- When is an acceptance "communicated?"
- 26- How must an acceptance be made where the offer names a method for same?
- 27- If an offer indicates that doing a stated thing will be an acceptance, what is the legal result of so doing?
- 28-§38. State the rules governing acceptance of offers made by mail or telegraph?
- 29- In offers by mail what is the legal relation to offeror of the postoffice service? Same as to one by telegraph.
- 30- When does an acceptance, duly made by mail or telegraph, operate to consummate a contract?
- 31- Give illustrations of binding acceptances by mail where letter of acceptance never reached offeror.
- 32- What is the legal theory underlying the governing rule in such cases?
- 33-§39. State the progressive steps whereby existing rule in such cases became legally established.

- 34- Restate the now settled rule for acceptance by mail or telegraph.
- 35- What is essential to constitute a valid contract?
- 36-§40. If an acceptance modifies, or changes the terms of the offer, what results?
- 37- Give illustrations of modifying acceptances, and tell the result in each case.
- 38- State some extreme cases of the application of the rule of modified acceptances.
- 39- What is necessary to make an acceptance fully and clearly operative?
- 40-§41. What is the legal effect of conditional acceptances?
- 41- Give an illustration of a conditional acceptance.
- 42-§42. How does ancilliary matter in an acceptance affect its legal operation?
- 43- State some illustrative cases of acceptances with ancilliary matters therein.
- 44§43. When will an offer lapse?
- 45- Can an offer made by one who subsequently dies be accepted thereafter by offeree?
- 46- Can one's legal representatives, after his death, accept an offer made him?
- 47- What is the rule where an acceptance is duly mailed by offeree before offeror's death but not received until afterwards?
- 48- State what you know about an offer lapsing because not accepted in the manner the offer prescribed.
- 49- Same, as to lapse of offer by the passing of time.
- 50- How is "reasonable time," for the acceptance of an offer, to be determined?
- 51- How, otherwise than by ways covered by questions already asked, can offers lapse?
- 52- When can an offer be revoked or withdrawn?
- 53-§44. What rights are created by an unaccepted offer?
- 54- Suppose offer is coupled with a promise to hold it open for a stated time, what effect has such promise?
- 55- When will a promise to hold an offer open be binding on offeror?

- 56-§45. State the legal difference between "communication" of the revocation, and one of the acceptance, of an offer—be explicit.
- 57- What difference, if any, is there in the rule as to such "communication" where the parties are together, and where they are distantly apart?
- 58- Suppose an offeror has done some act rendering it impossible to fulfill his offer, what follows?
- 59- What would, and what would not, constitute notice to offeree of offeror's change of intention?
- 60- What are the legal rights of an offeree who has accepted an offer, not knowing of its revocation by offeror?
- 61- State concisely, the rule as to up to what moment an offer is revocable; and likewise as to the "communication" of revocation.
- 62-§46. Define "refusals" of offers.
- 63- When are "refusals" legally obligatory?
- 64- When can they be revoked and how?
- 65-§47. By whom can, or must, an offer be accepted to bind the offeror?
- 66- Must offers be made to definite individuals to hold the offeror?
- 67- What about offers of reward, as constituting legal obligations?
- 68- When do such offers become binding contracts?
- 69- What troublesome questions arise in such matters?
- 70- State, and illustrate, the rule governing cases where a party does a service ignorant of a reward offered therefor.
- 71- What differing rules prevail on this point, and state the basis of each.
- 72- How do statements indicating offers, differ in legal obligation, from actual offers?
- 73- Are matters of inducement to trade, legally offers?
- 74- State distinguishing characteristics of such forms of communication.
- 75-§48. What distinctions arise in cases of auction sales?
- 76- Does the failure to hold an auction at the time named in an advertisement render the advertiser liable to one who attends at time and place stated—and why?

- 77- What is legal effect of an advertisement of an auction "without reserve?"
- 78- When is an auctioneer bound by bids received upon his offers?
- 79- What is the legal nature and effect of increasing bids?
- 80-§49. What rules govern public offers for contracts?
- 81- What legal rights does one acquire by answering advertisements for supplies, etc., and making bids?
- 82- How, if at all, can the general legal rights of a bidder under such circumstances, be curtailed?
- 83-§50. To what must offers relate to make them obligatory upon acceptance?
- 84- Can offers included in social invitations be made the basis of legal redress if withdrawn?
- 85- What is the rule as to definiteness of terms of an offer, to bind one thereto legally?
- 86-§51. How are contracts based upon an offer made in one state, and received and accepted by a party in another state, to be construed?
- 88- Where are contracts so entered into legally, "made," or executed?

LESSON 6.—

CHAPTER VI.

STATUTE OF FRAUDS.

- §52. Definition and Origin.
- 53. English Statute—American Counterparts.
- 54. As Affecting Realty Transactions.
- 55. Fourth Section.
 - (a) Promise by Executor and Administrator.
 - (b) Promise to Answer for Another's Obligation.
 - (c) Marriage Agreements.
 - (d) Contracts for Interest in Lands.
 - (e) Contracts Not Performed Within a Year.
- 56. Seventeenth Section. Contracts for Sale of Goods, Wares and Merchandise.
 - (a) In General.
 - (b) What this Section Includes.
 - (c) Value of Goods.
 - (d) Partial Acceptance and Receipt.
 - (e) Payments of Earnest Money.
- 57. Memorandum Required by Statute.
 - (a) Form.
 - (b) Parties.
 - (c) Substance.
 - (d) Varying Written Terms by Parol Evidence.
 - (e) Must State Consideration.
 - (f) Who Must Sign Memorandum.
- 58. Operation and Effect of Statute.
- 59. Summary.

52. Definition and Origin.—What is known as the “Statute of Frauds,” is that act of the legislature passed to prevent fraud, and to that end requiring contracts concerning certain matters to be in writing—or at least that some written, definite memoranda thereof be made,—or that, in personal property transactions, in lieu of the writing, a full or partial delivery and acceptance be made, or a full or partial payment therefor be given. Each state has a statute of this kind, and known by this name; and while, in some respects the statutes of the respective states vary, they are all based upon, and closely follow the original statute of frauds, enacted in England, in 1676.

§53. English Statute, and American Counterparts.—The object of the English statute, like that of 13 Elizabeth, was to prevent the facility with which frauds were committed, and to remove the temptation to perjury offered by dependance upon parol or oral evidence alone. The Act was entitled, “An Act for Prevention of Frauds, and Perjuries,” and its purpose was declared in its opening paragraph, thus: “For prevention of many fraudulent practices, which

are commonly endeavored to be upheld by perjury and subornation of perjury."

The statute was very sweeping in its provisions, covering numerous stated cases, and conditions. Only two sections of the original statute, however, have been generally adopted in the United States, viz., the fourth and the seventeenth. Some states have accepted both of these sections, in substantially their entirety, while others have taken only the fourth. The careful student will, of course, refer to the statute of his own state for specific information as to its special provisions, as in all like instances; but the following review of the statute will be found to accurately cover all of its general features. The original statute did not make a contract entered into against its provisions, null and void,—it still recognized such contracts as being valid so far as their bona-fides were concerned—but it simply forbade their enforcement by the courts. That is to say, the act related to the remedy, not to the right, of such contracts, and applied its restraint by providing that, "no action shall be brought" on contracts made in violation of its requirements. This characteristic has been followed by most of the states, but a very few, Missouri and Wisconsin, only, at the present time, make the specified contracts absolutely void,—that is, absolutely without legal effect.

The chief practical distinction between these two classes of provisions is that under the former, and the general rules, contracts made in violation of the statute, while unenforceable in themselves, may nevertheless be relied upon and proven when they are only collaterally, i. e. indirectly at issue, while in the latter instance they are, legally, wholly unrecognized.

§54. **As Affecting Realty Transactions.**—By far the most important contracts coming within the statute of frauds, and therefore, required to be in writing, are those affecting the transfer of the title to, or of some interest in, land. While our present study is upon the general subject of contracts and all the elements thereof already covered, and those which will later be considered, are fully applicable to agreements concerning real estate, still, because of

¹ Michels v. West, 109 Ill., App., 418.

the general, specific, clear-cut distinction between contracts affecting personalty, and those relating to realty, the provisions of the statute of frauds referring to the latter class of engagements, will be presented and discussed under the subject of Real Property. Accordingly we now turn to a consideration of those other sections of the statute in general use in this country.

§55. **The Fourth Section—(a) Promise by Executor or Administrator.**—Subdivision (1) of section 4 of the statute provides that no action shall be brought to charge an executor or administrator upon any special promise to answer damages out of his own estate unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized.

If an executor or administrator has no assets of the estate in his possession at the time of making the promise, then the statute applies; otherwise, he is presumed to have promised in behalf of the estate.² The promise must be to pay the debt of the decedent, and not one contracted by its executor or administrator in the course of the administration of the estate. Such debts are the personal obligations of the executor or administrator for which he will be given credit on his final settlement.³ In *Meade v. Bowles*,⁴ the defendant was an administrator who had promised orally to pay the plaintiffs their attorney fees for services in connection with the estate. The defense was that the contract not being in writing was void under the Statute of Frauds. The court held that inasmuch as the defendant had agreed to pay the plaintiffs, the fact that the services were for the estate made the debt none the less the debt of the defendant and not the debt of the estate, and, therefore, not a promise to "answer for a debt of the estate."

(b) **Promise to Answer for Another's Obligations.**—Subdivision (2) of the same section provides that no action shall be brought whereby to charge a defendant upon any special promise to answer for the debt, default or miscarriage or another, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in

² *Pratt v. Humphery*, 22 Conn., 317. v *Stuart*, 115 N. Y., 638.

³ *Baker v. Fuller*, 61 Me., 152; *Wales* ⁴ 123 Mich., 696.

writing signed by the party to be charged therewith or by some person by him duly authorized.

(The essentials to bring a case within this section of the statute are that there be a binding and subsisting liability or obligation on the part of a third person to the promisee. That is to say,—To bind the promisor, the party for whom the promise is made must be legally liable to the promisee—the person to whom the promise is made,—and such promise must be in writing.⁵ For instance: A owes a debt, or is otherwise obligated, legally, to B; in order to bind C to pay such debt, or answer for the failure of A to fulfill his obligation, C's promise to B to answer for A's default must be in writing.⁶ If, however, the promise is original and apart from any other obligation, even though it be for the benefit of a third person, the agreement is binding although not in writing. However, it is generally held that recognizances, or oral agreements to stand sponsor for the appearance of an accused, are original promises to the state. This rule seems to be based upon public policy rather than upon the fact that it is not within the statute.

The test, in these cases, is: Is the promise original or collateral?⁷ If collateral, it is within the application of the statute. The facts of each case must determine this question for itself. (If the promise is supported by a consideration beneficial to the promisor, it is original.⁸)

(The fact of domestic, social or business relationship determines the question only when the promisor is bound for the liabilities of the person for whose primary benefit the promise is made.) Such is the case in promises by the husband for the payment of obligations of the wife, the promise of one partner for a consideration to another, and the like.

(An oral promise to discharge the debt of another, if made to the debtor himself, is not within the statute; but if the promise is made to one to whom the debtor is liable, it is within the statute.) In *Vogel v. Melms*,⁹ the defendant agreed to indemnify the plaintiff if the latter would endorse the note of a third person. The plaintiff relied solely upon the defendant's oral promise and did not look to the person

⁵ 20 Cyc. 162, Sec. 4.

⁶ *Burt v. Hickie*, 18 Ind., App., 509;

Martin v. Jackson, 106 Ill., 433.

⁷ *Meade v. Bowles*, 123 Mich., 696

Resseter v. Waterman, 15 Ill., 169.

⁸ *Harding v. Joseph*, 14 Cal., 642.

⁹ 31 Wis., 306.

directly benefited for indemnity in case he should be compelled to pay the note. The jury so found and the court affirmed judgment for the plaintiff.¹⁰

(c) **Marriage Agreements.**—Subdivision (3) provides that no action shall be brought to charge any person upon any agreement made in consideration of marriage, unless the agreement, or some memorandum or notes thereof, shall be in writing and signed by the party to be charged therewith or by some person thereunto by him duly authorized.

Similar provisions are in force in nearly all of the United States. The statute, as later interpreted in England, does not apply to mutual promises to marry, and never did in this country, as they are founded upon a material consideration of marriage. It is necessary to distinguish between verbal promises made in consideration of marriage, and those which are made merely in contemplation of marriage. In *Larsen et al., v. Johnson*,¹² the heirs of the deceased wife contended that the statute of frauds invalidated—rendered void—under the Wisconsin statutes, a conveyance to the second husband who had married deceased under an oral agreement to marry her and support her during life in return for said conveyance to him. The court held that “there was sufficient lawful and valuable consideration of marriage,” and, although the agreement was not in writing, it was fully executed and performed by both parties to the agreement, thus making the case out of the statute. But a promise to give a stated sum of money to one for a certain person and not marrying another, must be in writing to be legally enforceable.¹³

(d) **Contracts for Interest in Lands.**—Subdivision (4) provides that no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith

¹⁰ In the case of *Voris v. Star City Bldg. and Loan Assn.*, 120 Ind. App., 630; the court in its decision cites many contracts, which are and which are not, within the statute. Students are urged to

read this case, carefully.

¹¹ *Short v. Statts*, 58 Ind., 29; *Clark v. Pendleton*, 2 Conn., 495.

¹² 78 Wis., 300.

¹³ *Austin v. Kuehn*, 111 Ill. App., 506; Affirmed, 211 Ill., 113.

or by some person thereunto by him duly authorized.

It is not always easy to say what is an "interest" in land within the meaning of this division of this section of the statute but it is safe to say that the interest must not be inappreciable and remote. An agreement to pay costs of an investigation of title for instance, is not within the operation of the section, nor would an agreement to transfer shares in a railway company which, though it possessed land, does not give any appreciable interest in that land to its individual stockholders. The principal question of interest under this subject relates to the sale of crops. A distinction exists as to these, between what are called emblemments, or fructus industriales; and growing grass, timber, or fruit upon the trees, which are called fructus naturales. (Fructus industriales do not in any sense constitute an interest in land.) Fructus naturales are considered to do so if the sale contemplates the passing of the property in them before they are severed from the soil. If the property is to pass after severance, both classes of crops are goods, wares and merchandise within the meaning of the 17th section of the statute, to be considered later. But where fructus industriales is intended to pass before severance, there is a general uncertainty whether they fall within the scope of section 17, though it is certain that the sale is not governed by section 4.¹⁴

(e) **Contracts Not to Be Performed Within a Year.**—Subdivision (5) provides that no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.

The fact that the contract may not be, or is not, performed within a year, does not bring it within the statute. The essential point is, "Was it contemplated by the parties that the agreement was not to be performed within a year from the date of the making thereof?" If it was, the statute

¹⁴ With this general statement of the matter covered by this subdivision, we pass the consideration of specific instances and types of interest

in land which must or must not be in writing, thereunder, until we come to the subject of Real Property.

applies; if not, then it does not. The statute does not apply, also, where there is even a remote chance or possibility of the contract being performed within a year.¹⁵ But it does apply where the agreement could not possibly be fulfilled within that time.¹⁶ Contracts which require a year for performance, are not within the statute merely from that fact.¹⁷ Nor those where the thing to be done may take more than a year, if either party has the right to cancel the contract within a year.¹⁸ An agreement does not fall within the section if that which one of the parties is to do, is all to be done within a year. This rule seems to be quite general in the United States except in some states, viz., Massachusetts, Indiana, Michigan, Vermont, Kentucky, New Hampshire and New York, which have deviated therefrom only so far as to allow a recovery in an action of assumpsit by the party who has performed his part of the agreement. Here equitable principles apply in providing a remedy where the rigor of the statute forbade it. Equity gives a remedy to the party who has performed his part of the contract. In the English case of *Britain v. Rossiter*,¹⁹ a contract of service, not to be performed within a year, was broken by the employer, who discharged the plaintiff after some months of service. An action was brought for wrongful dismissal and the court of appeal held that the equitable doctrine of part performance was inapplicable. "The true ground of the doctrine," said Cotton, L. J. "is, that, if the court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable to an action of trespass, the court would hold that there was strong evidence from the nature of the use of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken." In calculating the time on contracts, it is to be reckoned from the day they are made, not from the time of beginning the performance thereof.²⁰

(An oral agreement not to do a certain thing is not within the statute as the promissor may not live a year, hence the contract might terminate within the statutory period.)

¹⁵ *Neal v. Parker*, 98 Ind., 254.

¹⁶ *Standard Oil Co. v. Denton*, 24 Ky.

L. Rep., 1581, and last case cited.

¹⁷ *Derby v. Meyer*, 10 Fed. Rep., 241.

¹⁸ *Warner v. Texas etc Ry. Co.*, 164 U. S., 418.

¹⁹ *Queen's Bench*, Div. 123.

²⁰ *Shoop v. Rhice*, 55 Mo., 97.

But an unwritten agreement to not do a certain thing for a year from a future date named, is invalid, under the statute.²¹

§56. **Seventeenth Section—Contracts For Sale of Goods and Merchandise.**—The 17th section of the statute enacts that no contract for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized.

(a) **In General.**—Under this section it is not necessary that the consideration appear in writing it being presumed that there is a promise to pay a reasonable sum. The contract of sale under the English law has the effect of a conveyance; it passes the property in the thing sold. But in order to have this effect, the chattel—i. e. the personal property—agreed to be sold must be specific, and nothing must remain to be done to make the chattel complete or to ascertain its price, as weighing, measuring or testing. Such a contract is called an executed contract of sale. In case the chattel is not specific, or anything remains to be done to complete it, the property does not pass and the buyer does not acquire a right in rem, in the thing itself, but only a right in personam against the seller; that is, a right of action for the breach of the agreement. This is called an executory contract. When, however, the chattel is complete and the property passes into the possession of the purchaser, the contract is an executed contract.

It was long questioned whether the 17th section applied to an executory contract of sale, and the matter was not set at rest until more than a century and a half after the enactment of the statute. Finally, Lord Tenterden's Act,²² provided that this section should apply to all contracts for the sale of goods of the value of ten pounds sterling and upwards, whether executed or executory. The words of this section,—“shall be allowed to be good,”—unlike those of

²¹ Higgins v. Gager, 65 Ark., 604.

²² Geo. IV. c. 14.

section 4,—go to the existence of the contract itself and not merely to the remedy. There are several English decisions to the contrary, however, holding that both the 4th and 17th sections relate only to the evidence of the contract which is necessary for relief in court.

(b) **What This Section Includes.**—It is somewhat uncertain in this country, just what is included under this section. Many of the state statutes use the phrase of the English act—"goods, wares, and merchandise." Others state "personal property," while still others, read, "goods, chattels, or things in action." This varying phraseology, with the varying definitions of the things designated thereby, is the cause of the confusion mentioned.²³ All movable personal property is held in England, to be included, while some states, under the phrase, "things in action," include certain intangible personal property. In this country, it is held that promissory notes,²⁴ and bonds, and corporate stock,²⁵ are goods, wares and merchandise. A contract for work and labor is not. In the case of skilled labor upon a chattel it has been laid down that the contract is for the sale of goods if it contemplates the ultimate delivery of a chattel.²⁶ This rule has been disapproved in several of the states.²⁷

(c) **Value of Goods.**—If no value is stated by the parties, the question whether the value is sufficient to bring the contract within the statute,—the amount being \$50 under the American statutes,—is one of fact for the jury. If the amount is uncertain at the time of making the contract, and ultimately exceeds the statutory limit, the statute applies.²⁸ Where several articles are sold together, the value of each of which, by itself, is less than the statutory limit, but which in the aggregate exceeds that limit, the question whether there has been but one transaction or a series of different transactions, is one for the jury.

(d) **Partial Acceptance and Receipt.**—An acceptance and receipt of part of the goods takes the contract out of

²³ 20 Cyc. 243.

²⁴ Baldwin v. Williams, 3 Met., 365.
But the contrary was held in Vawter v. Griffin, 40 Ind., 593.

²⁵ Broadman v. Cutter, 128 Mass., 388.

²⁶ Lee v. Griffin, 1 B. & S. 272.

²⁷ Crockett v. Scriber, 64 Me., 447;
Goddard v. Binney, 115 Mass.,

454; Finney v. Opgar, 31 N. J. L.,
270; Cooks v. Millard, 65 N. Y.,
360; Meincke v. Faulk, 55 Wis.,
427.

²⁸ Kaufman v. Farley Mfg. Co., 78
Iowa, 679; Brown v. Sanborn, 21
Minn., 402. 68 Cal., 117.

the statute. In considering the sufficiency of the receipt and acceptance, the court in *Jamison v. Simon*,²⁹ said: "This action was brought to recover damages alleged to have resulted to the plaintiffs by reason of the breach by the defendants of a contract for the sale of a certain lot of wool. The contract was oral and no part of the price was paid. Under such circumstances the contract is by the statute declared to be invalid (unless the buyer accepts and receives part of the thing sold.) By the terms of the contract in the present case, the wool was to be delivered by the plaintiffs to the defendants at the railroad depot in Merced but, as says the vendee, the contract was invalid in law. That the wool was not accepted on the part of the defendants because of its alleged dampness, clearly appears from the evidence. Indeed, the objection of defendant's agent to accepting the wool is admitted in a letter put in evidence from the plaintiff, Jamison, to his co-plaintiff, Stewart, in which Jamison says: "The wool is damp. Mr. Simon wants me to discount twenty-five pounds on the bale. I am not willing to do it. We have agreed to wait eight or ten days after the rain is over, to weigh the wool if the dampness is out of it." The evidence further shows that at the expiration of the time agreed upon, Simon still refused to accept the wool, and the plaintiffs then sold it in Merced at the highest price obtainable, and brought this suit to recover the difference between the amount the wool would have brought at the price fixed in the oral agreement with the defendants and the amount realized by the sale. But as there was no acceptance of the property on the part of the defendants the case comes within the statute of frauds, and the action cannot be maintained. There may be a constructive acceptance while the goods remain in the hands of the vendor, as will be seen later on, in the study of Contracts.

(e) **Payment of Earnest Money.**—The payment of earnest money, or part of the purchase price, takes the transaction out of the operation of the statute. Such earnest money may be paid at the time the contract is entered into or afterwards.³⁰

• §57. **Memorandum Required By Statute**—(a) **Form.**—The form of the memorandum does not go to the existence

¹ 68 Cal., 117.

³⁰ *Thompson v. Alger*, 12 Metc., 425.

of the contract, but the effect of a non-compliance with the provisions of the statute is, simply, that no common law action can be brought until some memorandum or other writing is set forth as a basis of action. Thus the note or memorandum may be made so as to satisfy the statute at any time between the formation of the contract and the commencement of an action thereon. So, too, a party to the contract may sign a rough draft of its terms, and acknowledge his signature when the draft has been corrected, and the contract is actually concluded. Or, a proposal containing the names of the parties and the terms of the suggested contract, and signed by the proposer, will bind him, though the contract is concluded by a subsequent parol acceptance. Thus, it is evident that the form is evidentiary matter only. Any memorandum however informal, is sufficient if the agreement is clearly stated or outlined therein.³¹

(b) **Parties.**—The names of the parties to the contract must appear in the memorandum. (Such omissions therefrom cannot be shown by parol evidence.)³² For instance: A promised B that he would answer for the debt or default of C. The memorandum of the promise, though signed by A did not contain the name of B; it was held to be insufficient. “No document,” it was said in that case, “can be an agreement, or memorandum of one, which does not show on its face who the parties making the agreement are.”³³ It is settled, however, that a description of one of the contracting parties, though he be not named, will let in parol evidence, otherwise inadmissible, to show his identity.³⁴ This may occur where A as agent for B, enters into a contract with X in his own name; X may prove that he has really contracted with B, who has been described in the memorandum in the character of A. On the other hand, A is not permitted to prove that he is not the real party to the contract. This latter rule is based upon the law of estoppel, which will be treated under the subject of Equity Jurisprudence.

(c) **Substance.**—The memorandum may consist of communications by mail or by papers, but they must be con-

³⁰ Lash v. Paulin, 78 Mo., 391.

³² Nicholas v. Johnson, 10 Conn., 192.

³³ Williams v. Lake, 2 E. & E., 349.

³⁴ Fessenden v. Mussey, 11 Cush., 127; Dykes v. Townsend, 24 N. Y., 57.

nected, consistent and complete. (The only signature required is that of the party to be charged thereby. It is not therefore, the fact of the agreement but the terms, and all the terms, of the agreement that the statute requires to be expressed in writing. The terms need not all be expressed in the same document, and it is permissible to prove a memorandum from several papers, or from a correspondence, but the connection of the various terms must be made out from the papers themselves, and may not be shown by parol evidence.³⁵ The following is an example of insufficiency of a memorandum: A issued a prospectus of illustrations of Shakespeare, to be published on terms of subscription contained therein. B entered his name in a book entitled "Shakespeare Subscribers, their signatures," in A's shop. B afterwards refused to subscribe. He was sued upon his promise to do so, and it was held that there was no documentary evidence to connect the subscription book with the prospectus, so as to make a sufficient memorandum of the contract, and that the deficiency might not be made good by parol evidence.³⁶

As was seen under the subject of Offer and Acceptance, the terms of the contract must be consistent, and so must the terms of a contract memorandum. But, although the various documents in which the terms are found must be perfectly consistent with one another, yet if the contract is fully set out in writing it will not be affected by a repudiation of it contained in the same writing and signed by only one of the parties. They have agreed upon the contract, the statutory evidence is thereby supplied, and repudiation is not within the power of either party, alone, to make.

(d) **Varying Written Terms By Parol Evidence.**—

Where a contract does not fall within the statute, the parties may (1) put their agreement into writing; (2) contract only by parol; or, (3) put some of the terms in writing and arrange others by parol. (In the latter case, although that which is written may be varied by parol evidence, yet the terms arranged by parol are proved by parol, and they then supplement the writing, and so form one entire contract.)

³⁵ Adams v. McMillan, 7 Post, 73;
Tallman v. Franklin, 14 N. Y.,
584; Wall v. Wisconsin Cranberry

Co., 63 Iowa, 730.
³⁶ Boyde v. Drummond, 11 East.,
142.

But where an agreement falls within the statute, all its terms must be in writing, and parol evidence of terms not appearing in the writing would altogether invalidate the contract, as showing that it was something other than that which appeared in the written memorandum.

In *Beckwith v. Talbot*,³⁷ the United States Supreme Court held that the rule excluding parol proof, when the contract is within the operation of the statute, is subject to exceptions. In that case, it was held that parol proof, if clear and satisfactory, may be received to identify the agreement referred to in the collateral papers constituting the memorandum.³⁸

(e) **Must State Consideration.**—The consideration must be expressed in the memorandum of all contracts affected by the 4th section of the statute. This is the English rule and is required by statute in Minnesota, Oregon, Nevada and Alabama; but in nearly all the other states the statute expressly provides that the consideration need not be a part of the written memorandum. An exception has been made, however, in the case of the "promise to answer for the debt, default or miscarriage of another," by the English Mercantile Law Amendment Act, providing that a consideration need not be shown in the written memorandum in order to support an action.

(f) **Who Must Sign Memorandum.**—The memorandum must be signed by the party charged or his agent.³⁹ The signature need not be an actual subscription of the party's name; it may be a mark, or printed or stamped. Nor need it be placed at the end of the document; it may be at the beginning or in the middle. But it must be intended as a signature, and as such to be a recognition of the contract. Where mutual promises are the consideration of a contract, the trend of authority is that the signature of the party to be charged alone is sufficient. Upon this point however there is a conflict of decisions, but the better reasoning seems to be with that of the case of *Krohn v. Bantz*,⁴⁰ in which the plaintiff gave his promissory note for goods purchased from the defendant. The goods were not delivered and the

³⁷ 95 U. S., 237

³⁸ See, also, *Bishop v. Felcher*, 48 Mich., 555; *Fry v. Platt*, 32 Kan., 62; *Drake v. Seaman*, 97 N. Y.,

230; *King v. Wood*, 7 Mo., 389.

³⁹ *Dressel v. Jordan*, 104 Mass., 407.

⁴⁰ 68 Ind., 277.

maker of the note sued for a breach of the contract. The defendant, the seller of the goods, contended that the note was an insufficient memorandum of the contract, and his contention was sustained by the court on the ground that a promissory note is not a part payment, and that as a memorandum, it was not signed by the defendant the party, legally charged to deliver the goods.⁴¹ The agent, signing may be the agent of both parties. In the case of *Baptist Church v. Bigelow*,⁴² the trustees of the church brought an action to recover the price of a church pew sold to the defendant at public auction. The defendant bid \$60 for a pew designated on a plan of the church and it was struck off to him, the clerk writing the name of the defendant, and the price bid, on the plan. On the completion of the church, the defendant refused to accept a deed to the pew and also refused to pay the balance due on his bid, therefore, and suit was brought. His defense was that the sale was void within the statute of frauds because there was no proper note or memorandum in writing, signed by him, it being a contract for the sale of an interest in land. The court held that the writing on the plan of the church contained all the requisites of a legal memorandum, and that it was legally signed by him as the party to be charged, the auctioneer being the agent of both parties and so bound the defendant by signing the defendant's name to the plan of the church which memorandum the court held was sufficient. But an auctioneer's memorandum in order to be binding, must be made at the time of the purchase. In *Horton v. McCarthy*,⁴³ the auctioneer wrote the name of the purchaser, and the price of the land sold, on a slip of paper which contained nothing else. He later, at his office, wrote a full memorandum of the sale in his office-book. The court held that the memorandum made at the auction was insufficient, and that the book-entry made at the office was not made as the agent of the defendant, his agency having terminated when the sale was consummated.

In the absence of statutory provision to the contrary an agent's authority to sign a memorandum is not required to be in writing any more than in any other case of agen-

⁴¹ To the contrary, see *Perkins v. Hudsell*, 50 Ill., 217.

⁴² 16 Wend., 28.
⁴³ 53 Me., 394.

cy. Under the original statute of frauds it is unnecessary that the agent's authority be in writing, but in many jurisdictions the legislatures have specifically provided that written authority is essential to enable an agent to make a binding contract. This is the law in California, Colorado, Illinois, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania and South Dakota.

§58. **Operation and Effect of Statute.**—As has been said before, the general rule is that a contract coming within the operation of the statute is not void, but is merely incapable of sustaining an action at law to enforce it. This rule does not apply in cases in which the contract is collateral to the cause of action. In some states the statute declares that contracts within the statute and not meeting its requirements, are absolutely void.

(The rules of construction of the statute are unsettled. Some courts follow the English construction; some hold that the statute should be strictly construed in cases of doubt; and others allow more or less latitude in construction, especially in purely mercantile transactions. ⁴⁴)

(The statute applies to contracts made by corporations as well as to those made by individuals.) It does not extend to obligations implied by law, and hence they are enforceable although there is no writing witnessing them. The statute is available as a defense only to a party or parties to the contract, and no one else can take advantage of it or require the parties to do so. This is true whether the contract be for the sale of land, or of goods, wares and merchandise, or is in the nature of an agreement of guaranty. For instance, one who has fraudulently prevented a contract from being carried out cannot defend on the ground that the contract is within the statute and therefore unenforceable or void.

(In pleading the statute it is necessary to take notice of certain presumptions arising out of the requirements thereof.) The principal presumptions existing until contradicted, are, that a contract required by the statute to be in writing is in writing. (Also, that the authority of an agent is in writing.) If a party to a suit on a contract wishes to show

⁴⁴ *Greenville v. Greenville Water Works Co.*, 125 Ala., 625; *Rayl v.*

Ray, 58 Kan., 585; *Baltimore etc. Ry. Co. v. West*, 57 Ohio St., 161.

some other characteristic of a contract, which will bring it within the statute, he must plead it, as, for example, that there was part payment, or that there has been part performance of the contract.)

§59. **Summary.**—A memorandum is incomplete that does not evidence, (1), a contract concluded—so far, at least, as the party to be charged is concerned; (2) the names of both of the contracting parties; (3), the subject matter of the contract, so described that it may be identified; (4), in contracts for sale, the terms of credit and the price agreed upon where the price and terms are definite; (5), in many states, the consideration for the undertaking; and (6), under the statute of all the states, the signature of the party to be charged thereby, or this agent.⁴⁵

⁴⁵ Knowlton's Anson on Contracts, 2nd Amer. Ed., p. 72, n. 3.

CHAPTER VII.

CONDITIONAL CONTRACTS.

§60. Definition—Kinds of Conditions.

- 61. Conditions Subsequent.
- 62. Conditions Concurrent.
- 63. Conditions Precedent.

§60. **Definition—Kinds of Conditions.**—(As previously stated, a conditional contract is one which goes into effect, or is determined by, the happening or not happening of a certain event.) The condition may be (1) subsequent; (2) concurrent; or (3) precedent. In the first class of conditions, the rights of the promisee to the contract are determined by the happening of the stated event. In the second class the happening of the event and the rights of the promisee, must take place simultaneously. In the third class, the prescribed event must occur before the rights of the promisee under the contract arise. Conditional contracts, like all others, require mutuality, and if that is destroyed by the condition the latter fails for lack of consideration. Failure of the promisee to fulfill the condition, generally discharges the promisor from liability.

§61. **Conditions Subsequent.**—Conditions subsequent are those which determine the rights of the parties to a con-

tract, as regards its conclusion or performance.) Such conditions are usually anticipated by some expression in the contract, or there is some contingent circumstance which terminates the existence of the contractual relation. This circumstance may be any one or more of any conceivable kinds of happenings or events, which may be agreed upon by the parties to terminate the contract upon its coming or not coming to pass. ¹

§62. **Conditions Concurrent.**—In the case of concurrent conditions the promisee's rights are dependent upon his performance of some act simultaneously with the performance by the promisor. (Thus, if the promisor commences performance under the contract, and the promises are conditional upon a simultaneous performance, the promisee must also then commence performance.) (If the latter is not willing and ready to perform, the former is discharged from performance.) (This form of condition is more particularly applicable to contracts of sale, where payment and delivery are assumed,—in the absence of express stipulation,—to be intended to be contemporaneous.) (The seller cannot demand payment of the price, nor can the buyer demand delivery of the goods, unless each is ready to perform his part of the contract. ²)

§63. **Conditions Precedent.**—In the case of conditions precedent the promisee's rights do not arise until some act has been performed either by one of the contracting parties or by a third party, or until a specified time has elapsed.) One form of condition precedent, acts as a suspension of performance of the contract. (A breach of it does not discharge the contract, but, in case of non-fulfillment, no liability ever arises thereon.) (Insurance contracts, and surety bondings are based upon this form of precedent condition. In fact, any condition which suspends the operation of a contract for an uncertain length of time, and which may never occur, is an example of this class of conditions—sometimes called floating or suspensory, conditions.) The condition may be the lapse of a certain time; or the performance of some act by one of the parties in an unspecified time; or

¹ Ray v. Thompson, 12 Cush., 281.

Scales, 55 Ind., 282; Phelps v. Hubbard, 51 Vt., 489.

² Smith v. Lewis, 26 Conn., 110; How v. Rawson, 17 Ill., 588; Posey v.

the giving of notice by one of the parties. In all these cases if the condition is not fulfilled the contract is not discharged.³ (Until then it is merely a sort of option, or agreement dependent upon the natural sequence of events, or the volition of one of the parties.) (Those conditions precedent which effect a discharge of a contract are the essence of the contract, and a breach always gives a right of action.)⁴ (Thus, if a person promises to work for another, and the latter promises to pay a certain compensation in return for that work, the work is impliedly that which must be first performed, and then the party agreeing to pay must perform, or be liable for a breach of contract, upon proof of performance by the one doing the work.)

(Great difficulty is experienced, in some cases, in determining whether a promise is a warranty, or a condition precedent to the obligation imposed upon the promisee.) An undertaking that goods to be sold and delivered shall possess a certain quality, whether in the form of a description or of a warranty, is a condition, the performance of which is precedent to the duty of paying therefor imposed by the contract upon the vendee. In *Pope v. Allis*,⁵ the plaintiff bought through brokers 500 tons of iron with the understanding that it to be "No. 1" quality, delivered in Milwaukee. After delivery and examination the plaintiff refused to accept the iron, although it had been paid for by his agents. Defendant refused to reimburse the plaintiff, claiming that the latter could not rescind the contract, as there was only a breach of warranty. The court rendered a decision to the effect that the contract did not become an executed contract until the condition as to the quality of the iron was complied with. The jury having found the iron to be other than of "No. 1" quality, the condition was treated as of the essence of the contract, and its breach gave the plaintiff the right to rescind and to recover the money paid. (An acquiescence in a breach of a condition precedent, however, turns it into a warranty; but payment of the consideration is not necessarily a waiver of the right to treat the contract as discharged.)

³ *Bruce v. Snow*, 20 N. H., 484.

⁵ 115 U. S., 363.

⁴ *Van Horne v. Torrance*, 2 Fal., 304.

CHAPTER VIII.

QUASI CONTRACTS.

- §64. In General—Kinds.
- 65. Money Paid.
- 66. Money Received.
- 67. Use and Occupation.
- 68. Work and Services.
- 69. Where Tort Is Waived.

§64. **In General—Kinds.**—Our definition of quasi contracts revealed that the legal obligations thus termed are simply the law's method of compelling a party who has received, or by his own act obtained from another something of value except by way of voluntary gift, to pay a fair price therefor even though no agreement express or implied so to do, had been given previously to obtaining such value. (In short, quasi contracts are legal fictions.) (That is, where no promise was actually made to compensate for benefits received, under circumstances warranting the presumption that pay therefor was expected, the law makes believe that such promise was made, and so compels the recipient, upon the other's demand, to pay what is reasonable therefor. For instance: A man steals my horse and sells it for \$100. The law says I may waive the tort and recover the money received by the thief for the animal, if I desire to do so. Why? Because the law, in order to protect my legal right to the money, and enforce against the thief his legal duty to surrender it to me, implies a promise, that is, feigns a promise where there was none in fact, in order to support my legal right to the money. All I have to do in such a case is to prove that the defendant, without right, sold my horse for cash, which he still retains.

Quasi contracts arise from the following reasons: (1) Money paid; (2) Money received; (3) Use and occupation; (4) Work and services; (5) Where a tort is waived and suit is brought in *assumpsit*.

§65. **Money Paid**—Where a person pays money for another—not at his request which would thus constitute an implied contract, but under circumstances where the recipient with full knowledge of the payment accepts the benefit thereby done him,—the law will require him to reimburse the party who so paid the money. For example: A

¹ Ante §4, (c)

man, not a party to a note, was asked by a third person in the presence of the maker, to pay it. Such party did so, and receiving the note, handed it to the maker, saying: "Pay me the amount of the note sometime." On suit brought upon these facts, the court held that the maker of the note receiving the benefit of such payment without objection, and knowing of the request to pay it, and his acceptance of the paid note, raised an implied promise on his part to reimburse the party who took it up.² As a general principle of law, money paid under mistake of fact can be recovered;³ but money paid under a mistake of law cannot.⁴ Upon like principles to those stated above, money paid under duress, or undue influence, or by misrepresentations, can be recovered at law.⁵

§66. **Money Received.**—Actions under this title can be maintained where one party has received money belonging to another, and which he ought in equity and good conscience to pay to such other. Privity of contract is not necessary in this class of actions. Money collected for another and withheld; and money given to another for a specified purpose, but not applied as directed; are familiar illustrations of the class of cases included under this right of action.⁷

§67. **Use and Occupation.**—Where a person, without legal right, or without having previously so arranged with the owner or his agent, enters into the possession of premises—whether houses or lands, or both—and occupies and uses them, the law presumes a promise on his part to pay the reasonable value of such use and occupation. It will therefore uphold a claim by the owner for the recovery of such value.⁸

§68. **Work and Services.**—Where one does an act, or renders a service, for another person who is under a moral

² *Briguiet v. Coeney*, 39 Ia., 190; *Poe v. Dorrah*, 20 Ala., 288; *Watkins v. Richmond College*, 41 Mo., 302.

³ *Newell v. Smith*, 53 Conn., 72; *Espey v. Cincinnati Bank*, 18 Wall (U. S.), 603.

⁴ *United States Bank v. Daniel*, 12 Peters 33; *Richardson v. Dever*, 17 Col., 398.

⁵ *Arnold v. Ga., Ry. Co.*, 50 Ga., 304; *Chandler v. Sanger*, 114 Mass., 364; *Ligonies v. Ackerman*, 46 Ind., 552.

⁶ *Curtis v. Pawly*, 107 Cal., 257.

⁷ *Benter v. Craig*, 2 Mo., 198; *Guthrie v. Hyatt*, 1 Har., 446.

⁸ *Skinner v. Skinner*, 38 Neb., 756.

and legal obligation to do such act or service, and it is so done under such circumstances of urgent necessity that common decency would not sanction delay in so doing, the law gives the performer of such labor a right to recover of the other party what such service was fairly worth, even though no promise or inducement was given therefor by such party.⁹ Burial of one's wife in the absence of the husband, his whereabouts being unknown; and providing a sick child with medical attendance and nursing, the father having abandoned it; are illustrations of this feature of such contracts;¹⁰ as, too, is the case of making provision for a family driven from their home by a brutal husband and father.¹¹

Again, where one accepts the services of another, under circumstances showing that they were not gratuitously given;¹² and where services are rendered without any agreement as to the compensation therefor,¹² a like liability, and right of action, are created, although they more clearly resemble implied, rather than quasi, contracts.

§69. **Where Tort is Waived.**—Any action to recover for a wrong done another, could formerly be brought only for damages for the tort. Certain classes of torts, however, are now regarded as having created a contractual obligation, giving the wronged party, therefore, the right of waiving the tort, if he wishes so to do, and suing the wrong doer in an action of assumpsit as for a legal debt. (Such a case is where one, having lawful possession of personal property of another for safe keeping, or to be used according to directions of the owner, converts the same to his own use by selling it.) The owner may, in such event, sue, either on the tort, and get damages, or for the value of the goods, in an action of contract.¹⁴ In suing as on contract, his recovery is limited to the amount actually received for the goods by the wrong doer.¹⁵ To sustain such an action the goods must have been sold,—not exchanged or bartered;¹⁶ the wrong

⁹ Force v. Harnes, 17 N. J., Eq., 389;
Patterson v. Patterson, 59 N. Y.,
582.

¹⁰ Ambrose v. Kerrison, 10 C. B., 776.

¹¹ Ray v. Alden, 50 N. H., 83.

¹² Shelton v. Johnson, 40 Ia., 84;
Viley v. Pettit, 96 Ky., 576.

¹³ Spearman v. Texarkana, 4 Ark.,

348; Blaisdell v. Gladwin, 4 Cush.,
373.

¹⁴ White v. Brooks, 43 N. H., 402;
Bowman v. Browning, 17 Ark.,
599; Watson v. Stever, 25 Mich.,
386.

¹⁵ Saville v. Welch, 58 Vt., 683.

¹⁶ Fuller v. Duren, 36 Ala., 73.

doer must have received a benefit; and the owner a detriment or loss. ¹⁷ (Obtaining another's money wrongfully, and the wrongful use of another's real property, are additional instances where such a right may be executed.)

¹⁷ Webster v. Drinkwater, 5 Me., 319.

QUIZZER.

STATUTE OF FRAUDS.

- 1-§52. Define the statute of frauds.
- 2- Has each state such a statute?
- 3-§53. State its origin and purpose fully.
- 4- What was the title of the original act?
- 5- What can you say as to the comprehensiveness of the original act?
- 6- What sections thereof have been generally adopted in this country? *4th and 17th.*
- 7- What was the legal effect on contracts under the statute?
- 8- Did the act affect validity of contract? If not, to what did it apply?
- 9- Has the characteristic of the English Act been generally followed in this country?
- 10- State any exceptions thereto. *Mo. - Wis.*
- 11- State the practical distinction between the two classes of provisions in this country.
- 12-§54. What is the most important class of contracts affected by the statute? *Real Property.*
- 13- To what class of contracts under the statute is our present attention directed—and why?
- 14-§55. What does subdivision (1) of section 4 of the statute provide?
- 15-(a) What is necessary for the statute to apply under this subdivision?
- 16- When is the promise presumed to be in behalf of the estate?
- 17- What must the promise be?
- 18- What were the facts and holding in the case of Meade v. Bowles?
- 19-(b) What does subdivision (2) of section 4 provide?
- 20- What are the essentials of a contract in order to bring it within this subdivision?

- 21- Does the statute apply to an original promise not in writing?
- 22- What are sureties?
- 23- What is the nature of their promise?
- 24- What is the nature of the promise in a recognizance?
- 25- Upon what does the rule seem to be based? *Public policy*
- 26- What is the important test under this provision of the statute? *Original or collateral.*
- 27- What determines whether the promise is original or collateral?
- 28- Does relationship determine—if so when? *yes*
- 29- Is a promise to a debtor to pay his debt due to another within the statute?
- 30- What was the case of Vogel v. Melms?
- 31-(c) What does subdivision (3) of section 4 provide?
- 32- In what case does the provision not apply?
- 33- What must be the nature of the promise so far as consideration is concerned?
- 34- Cite a case on this point.
- 35-(d) What does subdivision (4) of section 4 provide?
- 36- What interests are not within this provision?
- 37- Give an example.
- 38- Define “Fructus Naturales,” and “Fructus Industriales.”
- 39- To which, as a general rule, does the statute apply?
- 40- Does this subdivision apply to crops severed from the soil?
- 41-(e) What does subdivision (5) of section 4 provide?
- 42- What is the essential point to bring a contract under this provision? *Time - 1 year*
- 43- State fully the conditions when a contract will, and when it will not, fall within this provision?
- 44- Give at least two illustrations of cases within the last question?
- 45- What principles apply in case an oral contract was to be performed in less than a year, and one party had performed?
- 46- What did the case of Britain v. Rossiter decide?
- 47-§56. What does the 17th section of the statute provide?

- 48-(a) Need the consideration appear in the memorandum—and why? *no*
- 49- What was the legal effect, under the English statute, of a contract of conveyance?
- 50- What must be the condition of a chattel sold, to obtain the benefit of the legal effect referred to?
- 51- What is an executed contract of sale? *Completed*
- 52- What is an executory contract of sale? *not*
- 53- What remedy exists for the breach of an executory contract?
- 54- What did Lord Tenterden's Act provide? *Good \$10*
- 55- What is legal effect on a contract of the words—"shall be allowed to be good"—in this section?
- 56-(b) Does this differ at all, if so, how, from the provisions of 4th section?
- 57- Are the English decisions uniform on this point? *no*
- 58- Is there any uncertainty as to what is included within the phrase, "goods, wares and merchandise?" *yes*
- 59- State the varying statutory phrases in this country analogous to this provision.
- 60- Is a contract for stocks or bonds, within the statute, in this country? *yes*
- 61- When is a contract for work and labor within the statute?
- 62-(c) When the value is uncertain how is it decided? *jury*
- 63- When there is a series of transactions what fact is necessary to be determined? *one sale or more*
- 64-(d) What will take a contract for goods, wares, and merchandise, out of the statute? *Acceptance & Release*
- 65- Give the facts and holding in Jamison v. Simon.
- 66-(e) What effect does part payment have? *out of statute*
- 67- Can there be a constructive acceptance by a vendee?
- 68-§57 Does the form of the memorandum required, affect the contract's validity? *no*
- (a)
- 69- What is the effect of a non-compliance with the statute as to the memorandum?
- 70- When may the note or memorandum be made?
- 71- What is the purpose of the form of the memorandum?
- 72-(b) What must appear in the memorandum? *names*

- 73- When may parol evidence be used to establish the identity of a party to a contract? *Agent*
- 74- Give an example showing the admissibility of parol evidence to prove the identity of a party. *Agent*
- 75-(c) May the memorandum consist of separate communications? *Yes*
- 76- What is required in such a case? *connected - consistent + complete*
- 77- How does estoppel apply in the proof of a memorandum?
- 78- Whose signature must appear in the memorandum? *That of the party to be charged.*
- 79- Does the fact that there is an agreement need to be expressed? *no - but the terms + all the terms*
- 80- Give an example of a disconnected memorandum?
- 81- Will a written repudiation by one party alone affect the contract? *no*
- 82- What is essential as to terms of the agreement, as shown by disconnected writings?
- 83- State the three methods which parties may use in making contracts not within the statute? *Parol. - with + by*
- 84- What is the rule as to the admissibility of parol evidence in such cases?
- 85- Can parol evidence be used in connection with contracts with the statute? *Yes*
- 86- What is requisite as to the written memorandum of contracts within the statute?
- 87-(e) What is the English rule as to consideration under the fourth section? *Must be expressed by statute*
- 88- What is the general rule in the United States? *by statute*
- 89- What exception is there to this rule? *Promiss estoppel*
- 90- Name the states in which the statute requires the memorandum to express the consideration? *Where, New York, Ala. + others*
- 91-(f) By whom must the memorandum be signed? *party charged*
- 92- Need the party to be charged sign it personally? *no Agent*
- 93- If not, by whom else can it be done, and in what manner, and where? *name - stamp - or mark*
- 94- What is the rule where mutual promises are the consideration?
- 95- What did Krohn v. Bantz decide? *N.B.*
- 96- What were the facts and holding in Baptist Church v. Bigelow? *OK.*
- 97- What was the ruling in Horton v. McCarty? *N.B.*

- 98- Need the agent's authority be in writing? *yes no -*
 99- Does your state so provide? *yes*
 100-§58. Is a contract which is contrary to the statute, void? *no*
 101- Does the statute apply to collateral contracts used as evidence? *no*
 102- What is the law in some states as to voidability? *Op.*
 103- What are the three methods of construction of the statute?
 104- Does the statute apply to contracts by corporations? *yes*
 105- Does the statute apply to implied contracts?
 106- To whom is the statute available as a defense,—and in what cases?
 107- What presumptions are there in pleading a contract under the statute?
 108-§59. Summarize the general requisites of the memorandum. *1 - 2 - 3 - 4 - 5 - 6 .*

CONDITIONAL CONTRACTS

- 1-§60. What is a conditional contract? *Happening or not*
 2- Name the different kinds of conditions affecting contracts. *Subsequent, 2 Concurrent, 3 precedent*
 3- What are the distinguishing features of each of the several conditions affecting contracts?
 4-§61. What is a condition subsequent?
 5- How are such conditions usually anticipated in contracts?
 6- What circumstances may be the basis of a contractual condition? *Contingent circumstances*
 7-§62. What are conditions concurrent? Illustrate.
 8- To what contracts is this form of condition particularly applicable? *Buying of goods*
 9-§63. What are conditions precedent?
 10- When do the promisee's rights arise under conditions precedent?
 11- Give illustrations of common forms of contract containing conditions precedent.
 12- What are conditions precedent sometimes called?
 13- What may be the nature of a condition precedent as to its fact? Illustrate.

- 14- Of what relation to a contract are conditions precedent which effect a discharge of the contract? Illustrate.
- 15- With what other factor of contracts are conditions sometimes confused?
- 16- State the facts and the decision in the case of Pope v. Allis. *From no. 1 ordered no 2. Recd.*
- 17- What effect upon a condition precedent has an acquiescence in a breach therefor? *Under the contract*
- 18- Does payment of the consideration waive the right to treat the contract as discharged? *no*

QUASI CONTRACTS

- 1-§64. What is the nature of a quasi contract?
- 2- State fully the characteristics of quasi contracts.
- 3- State a case of the nature of a quasi contract.
- 4- From what five reasons or causes do quasi contracts arise?
- 5-§65. When does the payment of money by one person for another create a quasi contract? Illustrate.
- 6- Can money paid under a mistake of fact be recovered?
- 7- Same, as to money paid under a mistake of law?
- 8- Can money paid under duress, or by undue influence, or misrepresentation, be recovered—if so, upon what principle?
- 9-§66. When can money received by one party but belonging to another be recovered, and on what principle?
- 10- Is privity of contract necessary in this class of action?
- 11- Give familiar illustrations of this class of cases.
- 12-§67. What can you say as to use and occupation being the basis of a quasi contract? State fully.
- 13-§68. Can one who does work, or renders services, for another recover payment therefore as on a quasi contract? Illustrate.
- 14-§69. What class of actions were formerly the sole remedy for a wrong done by one to another?
- 15- How are certain classes of such wrongs now regarded and what legal rights arise therefrom?

Answered and mailed to home office May 25 1911

LESSON 7.—

CHAPTER IX.

OPERATION OF CONTRACTS.

§70. Contractual Obligation When Enforceable by Third Party.

71. Privity of Contract.

72. Same—Changes in Common Law Rule.

73. Acquirement of Contract Rights by Third Parties.

(a) By Novation.

(b) By Subrogation.

(c) By Assignment of Contract.

74. Unassignable Contracts.

75. Assignability of Right of Action on Contracts.

76. Notice of Assignment.

77. Assignment of Negotiable Instruments.

78. Assignment by Operation of Law.

§70. **Contractual Obligations When Enforceable By Third Party.**—While, as has been stated, contractual rights are, in general, conferred only upon those who have taken contractual obligations, still there are some circumstances whereunder, as has also been said, one not a direct party to the agreement can enforce its provisions made—actually or impliedly—for his benefit. For instance, where one party deeds property to another, specifically directing that the grantee hold it for the benefit of a third person, such third person, although not a party to the contract itself, and hence under no contractual obligation, can, in equity, compel the grantee to observe the conditions of the conveyance.¹ (While one can, under circumstances similar to the illustration given, enforce a contract to which he is not a party, one cannot, on the contrary, have legal liability imposed upon him under a contract in which he did not participate.²)

§70. **Privity of Contract.**—From the foregoing it is seen that the relation whereby contractual rights and du-

¹ Newton v. Taylor, 32 Ohio St., 399; Chace v. Chapin, 130 Mass., 128. The exceptions to this general doctrine have principally been in cases where a legal trust in favor of the third party has been created, or where an equitable trust relation arises, as in the illustration given, and in the case of one paying money to a party for the use of a third person. Relationship, also, was formerly an ex-

ception, but the rule now seems to be settled that near relationship is no exception to the rule applied in some jurisdictions, namely;—that a third person cannot sue upon a contract made for his benefit and to which he is not a party.

² Dumford v. Nessiter, 5 Maule & S., 446; Walker v. Cronin, 107 Mass., 555.

ties are imposed upon one, arises from one's relations to the contract. (This contractual relation is commonly termed the privity of contract.) Without this privity—this relation to the contract—no right of action accrues to anyone upon a breach of the contract by one or the other of the parties thereto. To illustrate: A water company contracted with a city for the extinguishment of fires and failed to keep its contract. The house of A was burned for want of a sufficient supply of water to put out the fire. He brought suit against the company for damages to cover his loss, basing his right of action upon its contract with the city, and setting forth its failure to furnish sufficient water to extinguish the fire which consumed his property, as the cause of his loss. It was held by the court that there was no privity of contract between him and the company and, that therefore, an action by him for breach thereof, could not be sustained.³

Again, a vendor of goods assumes no responsibility and is not liable to remote purchasers—purchasers from his vendee—for misrepresentation, or breach of warranty, made in his contract with his vendee, and this, for lack of privity between him and the subsequent vendee or vendees.

§72. Same—Modern Changes in Common Law Rule.—

(The doctrine of the common law that a third person, not a party to a contract, cannot sue thereon, has been changed in effect in the greater number of the states by statute.) In these states, under the theory that the third person is “the real party in interest,” an action by such party may be sustained.) This is especially true under the code method of procedure which provides that either the party in whose name the contract was made, or the third party, for whose benefit it was made, may sue. (In all cases, however, the intention that the third party should benefit by the promise contained in the contract, must be clearly expressed.) In *Vrooman v. Turner*,⁵ the defendant purchased property subject to a mortgage, and the deed contained this recital:—“which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same

³ *Fowler v. Athens City Water Works Co.*, 83 Ga., 219. But the courts of Kentucky, Missouri and North Carolina hold to the con-

trary.

⁴ *Davidson v. Nichols*, 11 Allen, 514.
⁵ 69 N. Y., 280.

forming part of the consideration thereof." On foreclosure sale the amount received failed to pay the entire amount of the mortgage and the plaintiff sought to recover the deficiency in a personal action against the defendant. The court said in effect that there was no intention to secure any benefit to the mortgagee by the provisions of said deed, and no privity of contract between the plaintiff and defendant, therefore no duty arose on the part of the defendant in behalf of the plaintiff, and accordingly the plaintiff lost his suit.

§73. **Acquirement of Contract Rights by Third Parties.**—(a) **By Novation.**—(Novation is the substitution of one party in place of another party, whereby the former becomes subject to the same rights as the original party whose contractual relation he assumes.) This form of substitution can be effected by the execution of a new contract. (One class of novation is where a creditor, his debtor, and a third person, enter into an agreement whereby the third party agrees to pay the debtor's obligation to the creditor, and the creditor thereupon releases the debtor.) In such a case the creditor can enforce the agreement against the third party by legal action, if necessary.⁶ Novation—the making of a new contract—was the only form of contract assignment known to the common law.

(b) **By Subrogation.**—(Subrogation is the substitution of one person for another under a contract whereby the person substituted acquires the rights or liabilities of the other in the particular contract.) It differs from novation in that it does not arise out of an express contract but is a creation of equity, and is not dependent on the execution of a new contract. The only right acquired by the person subrogated is a right of action against the party at fault for the loss occasioned by indemnifying the third party, or original promisee. (In other words, the obligation of the debtor, or promisor, is not extinguished by subrogation.) He is still a party to the contract so far as his liability is concerned;

⁶ This right is no exception to the rule previously discussed forbidding enforcement of contracts by, or against, persons not parties thereto; for as we have stated, a

new, distinct contract is made, where the new party is obligated, and it is this new obligation that gives the legal right of action.

while in novation his liability ceases to exist.⁷ The person subrogated is merely a surety, insurer, or guarantor, and is not subrogated until after a breach by the party insured or guaranteed and the indemnity has been paid by the guarantor to the promisee. Strictly speaking, it is incorrect to say that a person acquiring a right under a contract by subrogation is not a party to it. His rights are the rights of a party to the contract, but they are merely uncertain and contingent upon the default of the principal party. After such default, and the making good under the contract, by the surety, insurer or guarantor, he is, by his fulfillment of his guaranty, subrogated to all the contractual rights which his principal had in and under the contract.

(c) **By Assignment of Contract.**—(As a general rule contracts, public or private, and before or after breach thereof, may, in the absence of a provision therein to the contrary, or of a statute forbidding it, be assigned to another.)

This applies to all legal contracts of whatsoever nature excepting those cases where an assignment would be contrary to public policy or public morals; (those for personal services, or which require personal confidences; and those in which the rights are coupled with personal liabilities.) The parties to all other contracts are presumed to have intended to bind their assignee and legal representatives⁸ as well as themselves; and it is usual, where this is intended, to incorporate a clause to that effect. (For this reason a party to a contract has the same right to enforce it against such third person as he has to enforce it against the original party or parties to it.)

(Contracts involving the relation of personal confidence can not be assigned.) (In such contracts the chief consideration is that the terms are to be performed, or the rights exercised by the person contemplated in the contract and none other.) (Such contracts are those for attorney, or medical services, exclusive agency, partnership, the painting of a picture, the working of land on shares, and the like.)

⁷ American Lumber Co. v. Mulcrane, 55 Mich., 622; Parsons v. Tillman, 93 Ind., 298; Lynch v. Austin, 51 Wis., 287.

⁸ Petrie v. Voorhees, 8 N. J. Eq., 3;

Woods v. Ridley, 27 Miss., 119. As to assignability of public contracts, see Anderson v. De Vrioste, 96 Cal., 404; Louls v. Clemens, 42 Mo., 69.

(The criterion governing all such cases may be said to be whether the contract is binding upon the executors or administrators of the parties thereto, or either of them. If so, as to those parties whose administrative survivors would be bound, the contract is assignable.⁹)

§74. Unassignable Contracts.—Contractual liabilities cannot be assigned.) More clearly stated, the rule may be said to be that one cannot, by assignment, pass or transfer to another his liabilities under a contract, and thereby obligate the other party to the contract to accept the assignee in his stead. Everyone has the right to select and determine with whom he will contract, and he cannot have another person thrust upon him without his consent.¹⁰ Pollock, in his work on Contracts (4th ed.) p. 425, has well stated this rule thus: (“Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided.”¹¹)

§75. Assignability of Right of Action in Contract.—A chose in action, i. e., the right to bring an action, under a contract, does not accrue until there has been a breach or failure to perform the contract. The right thus arising, although inseparable from the contract, may be assigned.)

⁹ Devlin v. Mayor, 63 N. Y., 16; Groot v. Storey, 41 Vt., 533; Taylor v. Palmer, 31 Cal., 240.

¹⁰ King v. Batterson, 13 R. I., 117; Lansden v. McCarthy, 45 Mo., 106; Boston Ice Co. v. Patten, 123 Mass., 28.

¹¹ The rule that liabilities cannot be assigned is exemplified by the case of Arkansas Smelting Co. v. Belden Co., 127 U. S., 379. In that case, the defendant contracted with a certain firm which operated a smelting works and all contracts were assigned to one Billing. The defendant continued to ship ore under the original contract. Later, Billing conveyed the smelter to the plaintiff corporation, and also assigned to plaintiff the contract with the defendant. Then the defendant gave notice that it con-

sidered the contract cancelled, and refused to ship the remainder of the ore under the contract. In an action for damages for breach of contract, the court handed down its decision to the effect that the defendant had depended upon the credit and solvency of the particular party with which it had first contracted, and that it could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted. The defendant consented to the first assignment, although not in duty bound to do so, but had a perfect right to decline to assent to the substitution of plaintiff's liability for that of Billing.

The general rule, both at law and in equity, is, that a person can assign no greater interest than he, himself, has. (If there is any set-off or counterclaim against him, his assignee takes the assignment subject to the defenses.) For example, if one party is induced by fraud to enter into a contract, and the fraudulent party assigns his interest to another, the defrauded party may have the contract set aside in equity, even though the assignee was innocent of any fraud, and gave value for the contract.)

§76. **Notice of Assignment.**—Notice of the assignment of a contract, or of the contractual right, should, as a general rule, be given to the non-assigning party to the contract, in order to surely render him legally liable, under the contract, to the assignee. (The rule stated is that of the United States supreme court and that of most of the individual states.) Even those courts which hold that such notice is not strictly necessary, always give preference, in cases of conflicting assignment interests, to those parties who in fact do give notice of the assignment to the non-assigning party;—and to the assignee first giving such notice, where there are subsequent assignments.¹²

§77. **Assignment of Negotiable Instruments.**—The transfer of negotiable instruments before their maturity, owing to their peculiar commercial characteristics, is governed by a different class of rules than the transfer or assignment of other contracts. These special rules will be stated in the lessons on Negotiable Instruments. (For the present it is sufficient to say that their transfer before maturity requires no privity of contract between the parties; that the instrument passes by mere indorsement free from any defenses in the hands of the bona fide holder; and that no notice of the transfer is necessary.) (When, however, the instrument has matured, it cannot then be transferred by simple indorsement and pass clear title thereto free from equities against it.) (Indeed commercial paper upon its maturity—i. e. upon its becoming due—loses its negotiability and becomes simply an item of personal property.) Thereafter the proper mode—as well as the legal effect—of its transfer, is by an assignment in the same manner as the as-

¹² Heemans v. Ellsworth, 64 N. Y., 159.

signment of any other form of contract. Under such circumstances, it is governed by the same rules of law as other contractual instruments.

§78. **Assignment By Operation of Law.**—Certain contractual obligations and rights, and certain property interests, pass, under certain conditions, as a matter of law—are transferred, that is to say, without any contractual or other act upon the part of the parties in interest, and solely by the operation of the law upon the changed relations to the matter in hand. (For instance, a covenant running with land transferred,—such as an agreement to repair, or a party wall agreement—is in effect assigned to the transferee merely by the conveyance of the property to him.) (At common law, marriage transferred to the husband the personal property of the wife, and likewise her liabilities, whether under contract or otherwise.) (Representatives of deceased persons acquire all contractual rights to personal property, and all liabilities chargeable upon it; and the heirs or devisees acquire such rights, and are subject to the liabilities affecting the real property of the deceased, by the law's operation and without any act on the part of those in interest. Contracts for personal services, or for personal skill of the deceased, do not survive; nor do contracts which involve purely personal relations, such as a promise to marry.)

CHAPTER X.

INTERPRETATION OF CONTRACTS.

§79 Definition and Purpose.

80. Entire Contract Must be Regarded.

81. Grammatical Errors—Ambiguities.

82. Implied Obligations.

83. "Time," in Contracts.

84. "Penalty," and "Damages," in Contracts.

85. "Joint," and "Several," Contracts.

§79. **Definition and Purpose.**—The words "interpretation" and "construction" as applied to the question of the meaning of a contract, signify the ascertainment, from the instrument itself, (of the actual intention and purpose of the parties thereto as it is expressed therein.) The purpose of interpreting and construing contracts, as the given definition of the words show, is to get therefrom the real intention

of the parties thereto, so as to carry it out fully and accurately.) Courts enforce contracts; they do not make them for the contracting parties. Accordingly they seek the meaning of the contract from its own context only, and do not inject therein anything not clearly expressed thereby.¹ (The construction of contracts is a question of law for the courts, and not for the jury, to decide.)

§80. **Entire Contract Must Be Regarded.**—The first great rule in the interpretation of contracts is that a contract in its entirety—the whole contract—must be considered, and the intention of the parties thereto must be gathered from all—and not from any portion merely—of the language they have used in the contract.²

(The words of a contract are to be understood in their plain meaning, subject, however, to the inference of intention as shown by the whole document.) (The most common usage of words may be varied by their usage in a particular locality; and, again, the whole instrument may show an intention to give a narrower or broader meaning to words than is commonly given in a strict interpretation.) In every case the court is governed by the intention of the parties as shown by the whole document. (Words with a general meaning will be restricted to the subject-matter to which they apply, and will be construed most strongly against the party using them.)

Formerly the courts of common law held more to the principles of a strict interpretation of contracts rather than to allowing the intention, derived from the whole contents of an agreement, to govern them; but this has long been done away with. A statement in the decision of the United States supreme court in *Herryford v. Davis*, cited above emphasizes this point of arriving at the intention of the parties, thus: (“What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all the others, but in the ruling intention of the parties, gathered from all the language they have used. It

¹ *Brown v. Slater*, 16 Conn., 192;
Steele v. Branch, 40 Cal., 3.

² *Herryford v. Davis*, 102 U. S., 235;

see, too, *Mason v. Alabama Iron Wks.*, 73 Ala., 270; *Alton v. Transp. Co.*, 12 Ill., 38.

is the legal effect of the whole which is to be sought for."

§80. **Grammatical Errors — Ambiguities.** — Obvious mistakes in writing and grammar seldom have any effect upon the interpretation of contracts.) (The most usual error, causing a different meaning to be given to a contract than was intended, is incorrect punctuation;) but courts will not allow this form of error to control the intention as expressed in the whole document.)

(Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render the contract invalid, the former will be adopted, so as to uphold the contract. ³) So, where one construction will render the contract unlawful as being contrary to law or public policy, and the other will render it lawful, the latter will be adopted; as it is presumed that the intention was to execute a contract valid in law. ⁴) (The same rule applies to the interpretation of certain words so as to give them a reasonable rather than an unreasonable meaning.) (The fact that the parties, themselves, placed an erroneous construction on the terms of a contract, will not prevent the court from giving it the true construction. ⁵) but where the meaning is doubtful, such construction by the parties is of great weight in determining the actual meaning, and in some cases it may be controlling. ⁶ Even in cases where one party has acted upon the interpretation most favorable to his rights, that interpretation will prevail, providing it is not a too strained construction. ⁷ (So, too, parties will be bound by what their contract, by its words, expresses, whether they actually intended it, as they in fact expressed it, or not. ⁸)

§82. **Implied Obligations.**—Certain obligations are necessarily implied in a contract, and when these implications are necessary, or are necessarily drawn from the instrument itself, it will be presumed that such was the inten-

³ Pitney v. Bolton, 45 N. J. Eq., 639;
Coyne v. Weaver, 84 N. Y., 386;
Phillips v. McFarlane, 3 Minn.,
109.

⁴ Alfree v. Gates, 82 Iowa, 119;
United States v. Central Pac. Ry.
Co., 118 U. S., 235.

⁵ Hershey v. Luce, 56 Ark., 320; Rus-

sell v. Young, 94 Fed., 45.

⁶ Hosmer v. McDonald, 80 Wis., 54;
District of Columbia v. Gallaher,
124 U. S., 505.

⁷ London & S. F. Bank v. Parrott, 125
Cal., 472.

⁸ Cramp Ship Bldg. Co. v. Sloan, 21
Fed. Rep., 561.

tion of the parties. Whether or not they knew the consequences of the terms, as expressed by them does not matter. The rule will hold, unless they actually exclude the necessary implication from the operation of the contract by express provisions therein. This principle is illustrated by an ordinary contract of sale. In this class of contracts, in the absence of some express provision to the contrary, it is conclusively presumed that the seller intended to stipulate that he had title to the property and the right to sell it. This implication of law is called "implied warranty."

§83. **"Time" in Contracts.**—Time is said to be of the essence of a contract when, by the express terms of the contract, it is clear that the thing to be done was to be accomplished at a stated time. (The common law rule, that time is of the essence of a contract, is not generally taken into consideration unless the parties expressed such an intention in the contract. In the absence of such an expression, the rule is that a reasonable time was meant.) (In some cases, according to the nature of the contract, it will be implied that time is of the essence, as in contracts for the manufacture and the sale of goods.) (In contracts, such as those for the sale of land, time is not of the essence of the contract.) In other words, if one of the parties, in such cases, does not do a certain stated thing by a certain day, the other party is not discharged from the contract because of the former's tardiness.

§84. **"Penalty" and "Damages" in Contracts.**—If the parties to a contract name therein a certain sum to be paid by one to the other, on breach of the contract, such sum may be recovered if it was intended to represent the damages sustained by non-performance of the contract. If, however, it was intended merely as a penalty for non-fulfillment, regardless of the actual loss sustained, the courts will limit the amount recovered to the amount of the actual loss shown. In determining whether the sum named in the contract is a penalty, or is liquidated—i. e. ascertained—damages, the following tests may be applied: (1) Is the sum named, greater than the value of the subject matter as expressed in the contract? (2) If the value is not expressed, is the sum in excess of the probable damage? (3) If the debt is payable in installments, is the sum fixed in the contract greater than the total of all the installments? According to the

findings, as determined by these questions, the character—and hence the measure—of the recovery under such a provision is determined. The courts will not be controlled by the term used by the parties in the contract. Whether they used the word “damages” or “penalty,” the sum recoverable thereunder will depend upon the interpretation of their real instruction, as shown by the document itself. Recovery is had in an action for breach of contract. A full treatment of the different aspects of damages will be given under the subject of Damages.

The following rules are useful in determining whether the sum fixed by parties is liquidated damages, or is merely a penalty. (1) If the value of the subject matter of the contract is certain or is easily ascertained, the sum in excess of that value is a penalty, and no greater amount can be recovered. (2) If, however, the value of the subject matter is uncertain, and the sum fixed is not, on the face of the contracts, greatly in excess of the probable damages, the sum is recoverable as liquidated damages. (3) If the obligation is to be paid in installments, it is not imposing a penalty to provide that on default in any one payment the entire balance of unpaid payments shall at once fall due.)

§85. **“Joint” and “Several” Contracts.**—A contract in which two or more persons join in the promise or obligation, is a “joint” contract, and enforceable against all of them.⁹ A contract in which two or more persons promise individually and singly is a “several” contract and enforceable only against each one individually. This principle will yield, however, under an expression in the contract directly to the contrary.

(A “joint” promise is collective; a “several” promise is singular.) In the first class of cases the promisee must unite all the promisors in his suit; in the second class he can sue any one or more of them separately for the full amount. A “joint and several” promise is one where the parties undertake both collectively and separately to do the thing promised. Under such a contract the promisee may sue either promisor singly, or he may sue all, or any number less than all, at any one time.¹⁰

⁹ Bower v. Swodlen, 1 Atk., 294; Cutts v. Gordon, 13 Me., 474.

¹⁰ Bangor Bank v. Treat, 6 Greenleaf, 207.

In the case of subscriptions by a number of persons to promote some common enterprise, the promises, though joint in form, are held to be several. Each subscriber is held to promise separately and severally, and an action against all the subscribers jointly will not lie.¹¹ Joint and several engagements are almost entirely controlled by statute at the present time, hence, in practice, the student must consult the affairs of his own state.)

¹¹ Dean v. Wilson, 10 Wall., 158.

QUIZZER.

OPERATION OF CONTRACTS.

- 1-§70. Can one not direct party to a contract enforce its provisions? If so, when?
- 2- In what cases have exceptions been made, principally?
- 3- Does the fact of personal relationship afford a basis for such exceptions?
- 4- Can one have a legal liability imposed upon him by a contract wherein he does not participate?
- 5-§71. From what does contractual obligation arise?
- 6- What is the contractual relation commonly called?
- 7- What legal right accrues from this relation?
- 8- State a case where a right of action was derived for lack of privity of contract.
- 9-§72. Has the common law rule as to the right to sue without privity of contract been changed? If so, how and where?
- 10- Upon what theory is this based?
- 11- Under what system of procedure is this particularly permitted?
- 12- What is always essential as the basis of such right?
- 13- Give illustrative case which was lost for lack of privity of contract.
- 14-§73. Define novation.
- 15-(a) How, only, can novation be effected?
- 16- Give an illustration of a novation.
- 17- What was the only common law form of contract assignment?

- 18- Is novation an exception to the rule forbidding contract enforcement by non-contracting party—Why?
- 19-(b) Define subrogation.
- 20- How does it differ from novation?
- 21- What is the only right acquired by the person subrogated?
- 22- Does subrogation extinguish the obligation of the original promisor?
- 23- In this respect does subrogation differ from novation—if so, how?
- 24- What is the real contractual relation of a subrogator?
- 25- What are a subrogator's rights, and upon what are they contingent?
- 26- What is the legal position of a subrogator after the default of the original promisor?
- 27-(c) State the general rule governing the assignment of contracts.
- 28- To what contracts does the rule apply?
- 29- What presumption attaches to all contracts?
- 30- What right, and in whose favor, is based upon this presumption?
- 31- What contracts cannot be assigned—and why?
- 32- What criterion governs all cases, as to their assignability?
- 33-§74. Are contractual liabilities assignable—and why?
- 34- Give Pollock's statement of the rule.
- 35- State a case where an assigned contract-liability was not enforced.
- 36-§75. What is a "chose in action?"
- 37- Are such rights assignable—if so, when? *yes.*
- 38- What contract-interest can one assign?
- 39- Are assigned contract rights subject to any defenses that were good between the original parties? If so, name some defenses.
- 40-§76. Is it necessary to give notice to any one, of the assignment of a contract?
- 41- If so, to whom and for what reason?
- 42- Between what parties is such notice unnecessary?
- 43- Is the rule requiring notice universal?

- 44- If not, what advantage follows giving it where it is not required?
 - 45-§77. Are the rules governing the assignment of general contracts, applicable to negotiable instruments?
 - 46- What can you say as to lack of privity of contract in such instruments; how they pass to others; and necessity of notice of transfer?
 - 47- What is the rule as to transfer of such instruments after their maturity?
 - 48- What effect does maturity of commercial paper produce as to its legal character?
 - 49- How can matured commercial paper be transferred, and by what rules is it then governed?
 - 50-§78. What can you say as to transfer of contractual obligations by operation of law?
 - 51- State instances of such transfers.
-

INTERPRETATION OF CONTRACTS.

- 1-§79. Define "interpretation," and "construction," as they apply to determining contracts.
- 2- What is the purpose of the interpretation and the construction of contracts?
- 3- What is, and what is not, the province of the court as to contracts?
- 4- Where do courts obtain the meaning of contracts?
- 5- What is the nature of the question as to the construction of contracts—and who decides it? *court*
- 6-§80. State the first great rule in the interpretation of contracts.
- 7- In interpreting contracts how are their words to be taken and understood?
- 8- How may the common usage of words be varied and what, as to same, may the contract show?
- 9- By what is the court always governed?
- 10- How will the words of a contract be restricted, and construed?
- 11- What rule of construction has become modified, and with what result?
- 12- What is the true construction of a contract?
- 13-§81. What effect on a contract have grammatical errors?

- 14- Can improper punctuation control the interpretation of a contract? *no*
- 15- What is the rule governing interpretation making a contract valid or invalid?
- 16- What is the rule governing interpretations rendering the contract unlawful or lawful?
- 17- So, too, as to reasonable or unreasonable meanings of words?
- 18- What effect on a court's interpretation of a contract will an erroneous interpretation placed thereon by the parties thereto, have?
- 19- What follows where one party has acted upon his own interpretation?
- 20- Also, where the contract words express a meaning other than that intended?
- 21-§82. What will be presumed as to obligations necessarily implied, though not definitely expressed, in a contract?
- 22- What effect does an ignorance of the consequences of terms used, have?
- 23- How can implications necessarily arising from the express words of a contract, be avoided?
- 24- State an illustration of a "necessary implication."
- 25- What is an implied warranty?
- 26-§83. What is meant by the term, "time is of the essence" of a contract?
- 27- What is the common law rule as to time being of the essence?
- 28- How can time be made the essence of a contract?
- 29- Where it is not so made the essence, what rule governs the interpretation as to time?
- 30- Will time ever be implied as being of the essence of contracts?
- 31- Name some cases where it will, and others where it will not, be so implied.
- 32-§84. State the rule as to "liquidated damages," and "penalties," named in contracts.
- 33- What tests determine whether a sum fixed in a contract is to be regarded as damages or penalty.
- 34- Will the court be controlled in its interpretation by the term used in the contract?

- 35- What will determine the amount recoverable under such a provision?
- 36- How is recovery in such cases obtained?
- 37- Give some rules helpful in determining whether a sum fixed in the contract is to be taken as damages or as penalty.
- 38-§85. What is a "joint" contract, and against whom is it enforceable?
- 39- What is a "several" contract, and against whom is it enforceable?
- 40- What kind of a promise is collective and what is singular?
- 41- Define a "joint and several" promise.
- 42- Against whom is such a contract enforceable?
- 43- Are subscription contracts joint or several?
- 44- How are joint and several contracts now controlled?

Read to here - 4-22-11

Answers sent in May 30-11

LESSON 8.—

CHAPTER XI.

DISCHARGE OF CONTRACTS.

- §86. In General.
- 87. By Fulfillment.
- 88. By Release, Recission and Waiver.
- 89. By Substitution of New Terms.
- 90. By Stipulations of Contract.
- 91. By Impossibility of Performance.
 - (a) Impossible Conditions.
 - (b) By Act of Law.
 - (c) By Destruction of Subject-matter.
 - (d) By Incapacity to Perform.
- 92. By Accord and Satisfaction.
- 93. Same—Subject Matter of—.
- 94. By Operation of Law.
 - (a) By Death.
 - (b) By Receiving Better Security.
 - (c) By Unauthorized Alteration.
 - (d) By Bankruptcy.
 - (e) By Statute of Limitations.
- 95. By Breach.
 - (a) In General.
 - (b) By Renunciation.
 - (c) By Impossibility or Failure to Perform.

§86. **In General.**—The discharge of a contract is the putting to an end of the contract,—or, rather the termination of all legal liabilities thereunder. This may be accomplished in many ways, some by the action of the parties, thereto, themselves; others by the operation of law. In the first instance a discharge is accomplished, (a) by the fulfillment of the terms of the contract—that is to say, by its performance; (b) by voluntary agreement between the parties;— that is, by their rescinding the contract, or by the release of one or more of the parties thereto, or by the making of a new contract in place of the original one; and (c) by a breach of the contract by one of the parties, and the like. In the second instance it is accomplished (a) by the death of any of the parties to the contract; (b) by their bankruptcy or insolvency; (c) by a material unauthorized alteration of the instrument—when the contract is in writing; (d) by a merger of the contract in another one; (e) by judicial judgment, and (f) by limitation of a time prescribed by statute. The consideration of the manner in which contracting parties may be released from their contractual obligations, involves the consideration also of the liabilities and rights of action arising upon the discharge of contracts.

As a general rule no right of action arises in any case except upon discharge by a breach of contract. The breach may be total, or merely a failure to abide by a certain term of the agreement. In either event the legal liability is the same, although the measure of damages thereon may vary. This subject of legal right of actions upon contracts will be treated in the succeeding lesson.

§87. **By Fulfillment.**—It needs no judicial authority to establish the fact that where the parties to a contract carry out its provisions in full, leaving nothing undone, and leave nothing to be done, on either side, the contract, by such fulfillment, is terminated. Such termination of a contract is the simplest form of the discharge of contractual obligations.

Where a promise is given upon an executed consideration, the performance of that promise discharges the contract; but where one promise is given in consideration for another, performance by one party does not necessarily discharge the contract, although it releases the performer from liability for non-performance. The fact as to the performance being complete depends upon the construction, rather than upon the operation of the contract.

§88. **Release, Recission and Waiver.**—Where the parties to a contract, by an express agreement, thereafter agree to release each other from all contractual liability under the contract, such termination thereof is termed a recission, release, or waiver, and under proper conditions is fully binding upon all parties in interest.) Such an agreement can legally affect only cases of executory contracts, and is not valid or binding where a right of action has accrued in favor of either party. If it is intended to release such right of action, a special stipulation therefor must be incorporated in the release or recission of the contract; or it must be given in a separate instrument. In short, to merely release a contract does not, of itself, release any accrued rights of action thereunder.¹

A contract of release must have a consideration, just the same as any other contract, in order for it to be binding on the parties. Mutual releases, where there are still things

¹ Moore v. Detroit Locomotive Works, 14 Mich., 266.

to be done under the contract by both parties, are sufficient, one release being a consideration for the other. Where the release runs to only one party, some additional consideration must be given,² or it must be under seal,³ Written contracts, and those under seal, can be released by a parol contract.⁴ This, because the release contract is a new agreement—as we have stated is necessary for it to be,—and a parol contract is wholly valid always. A parol release without consideration would of course be void.⁵

The weight of American authority is that the surrender of the evidence of indebtedness, such as voluntarily returning a note or mortgage to the maker, amounts to a release of the debt, and that such a release is valid whether the surrender was made for or without a consideration. However, the surrender must be made with the intention and for the purpose of discharging the indebtedness.⁶

§89. **Substitution of New Terms.**—Naturally a material change in a contract, whereby new terms and conditions are incorporated therein; or whereby certain provisions of the contract are erased or annulled, discharges the original contract.

In order to work a discharge by the substitution of new terms, the same must amount to a new contract and the intention to discharge the old one must thereby distinctly appear. This may be done by novation, or by substitution of parties, or by the creation of new terms entirely inconsistent with those of the old contract.) Substitution differs from waiver in that in waiver the contractual relation is extinguished, another form of contract obliterating and superseding the old form. In the latter case, the change of rights and liabilities, and the consequent extinction of those which before existed, form the consideration on each side for the new contract created by such alteration. To illustrate: In contracts for the sale of goods and their delivery at a stated time, the purchaser often verbally requests a postponement of delivery. After such has been granted, he sometimes re-

² *Finch v. Simon*, 70 N. Y. Supp., 361.

³ *Lancaster v. Elliott*, 50 Mo. App., 245; *Kidder v. Kidder*, 33 Pa. St., 268.

⁴ *Cummings v. Arnold*, 3 Met., 486.

⁵ *Seymore v. Menham*, 17 Johnson,

169; *Myers v. Byington*, 34 Ia., 205.

⁶ *Vanderbech v. Vanderbech*, 30 N. J. Eq., 270; *Albert v. Zigler*, 29 Pa. St., 50.

fuses to accept the goods at all, and when sued alleges that the contract was discharged by the alteration of the time of performance, and that the new contract is void because not in writing and so contrary to the 17th section of the statute of frauds. The majority of the English and American cases sustain the latter claim, but the first contention of the purchaser is not upheld, the courts holding that a voluntary forbearance to delivery, done at the request of the other party, differs from a substitution of one agreement for another, inasmuch as the postponement is not inconsistent with the terms of the original contract, and the purchaser prolongs the time of delivery at his own request. This is not the case where a contract is so far altered as to be inconsistent with the original agreement; or where a new party is substituted by the agreement of all concerned; in which instances the original contract would be thereby annulled

§90. **By Stipulation of Contract.**—A contract may contain the elements of its own discharge under the following circumstances: (a) non-fulfillment of a specified term of the contract; (b) the occurrence of a particular event; or (c) the exercise of an option to terminate upon notice. In case of non-fulfillment in the contemplation of the parties, as evidenced by their contract, no liability arises for non-performance of a particular term unless some loss, not contemplated by the parties, accrues therefrom, through the fault of the party failing to perform.

The occurrence of a particular event at a date later than that of the contract, is termed a condition subsequent. Upon the happening of such event as stated in the contract, it is thereby fulfilled. An ordinary bond furnishes an example of such a condition in a contract;—that is, on the fulfillment of the condition of the bond as therein stated, the bond becomes, ipso-facto, discharged. Thus, also, a common carrier's contract may terminate on the occurrence of events implied in every contract such as the happening of "an act of God," like an earthquake, avalanche or lightning, or inherent defects in the article carried, whereby they perish.^s The provision relating to optional termination is instanced by contracts of rental from month to month, and in

^s Fisk v. Chapman, 2 Ga., 349; Crosby v. Fitch, 12 Conn., 410.

fact, any contract providing for the release of either party from the obligations of the contract, upon notice to the other as specified therein.

§91. **By Impossibility of Performance.**—(a) **Impossible Conditions.**—Impossible conditions in a contract cannot be performed. If, therefore, a person contracts to do what, at the time, is absolutely impossible, the contract will not bind him, but, generally, where the contract is to do a thing which is possible in itself, the non-performance thereof is not excused by the occurrence of an inevitable accident, or other contingency. It is immaterial that the contingency was unforeseen. Thus, if a man contracts to build a house and during its construction it is destroyed by fire, the unforeseen destruction does not excuse non-performance.⁹ If a promisor makes his promise unconditionally, he takes the risk of being held liable thereon, even though performance should become impossible by circumstances beyond his control. He should have provided against such contingencies by proper provisions in his contract. There are certain exceptions to this rule, as will be pointed out in the following paragraphs.

(b) **By Act of Law.**—Legal impossibility to fulfill a contract arising from the operation of law, exonerates the promisor. The case of *Hughes v. Wamsutta Mills*,¹⁰ is an example of this kind of impossibility. In that case the plaintiff contracted to forfeit the money due him as wages, if he left defendant's employ without giving two weeks notice. While in such employment he was arrested and confined in jail. After his release, the employer refused to pay him the money due for services up to the time of his arrest, claiming forfeiture thereof by reason of the breach of the agreement to give the notice stated. Suit was brought, and the court held that the act of the law in the making of the arrest, constituted a legal impossibility of performance of the contract, which excused the plaintiff from any liability for his failure to give such notice, and therefore gave him judgment against his employer.

(c) **By Destruction of Subject-Matter.**—The destruction of the subject matter of a contract, without the fault of

⁹ *School Dist. No. 1 v. Danchy*, 25 Conn., 530. ¹⁰ *H. Allen (Mass.)*, 201.

either party thereto, operates as a discharge of the contract. If the intention of the parties as shown by the contract was based upon the assumption that a certain thing should continue in existence, then if, without the fault of the parties, the thing ceases to exist, the implied condition upon which the contract depended fails and the duty of performance no longer remains. In the case of *Dexter v. Norton et al.*,¹¹ the defendant contracted to deliver to the plaintiff 607 specified bales of cotton, which were identified by their marks. He had delivered 460 bales when the remainder were destroyed by fire without his fault. Cotton rose in value and the plaintiff claimed the increase in value as damages. The court held that under the contract the plaintiff would not have been obliged to accept other bales than those which had been specified and marked, and as thus identified were sold to him, and that, accordingly, the defendant could be legally held to deliver only the said bales, delivery of which was impossible by reason of the fire, and hence, the part of this contract which was unexecuted thus became impossible of performance. The existence of those certain bales was held to be an implied condition upon which the contract was based and their destruction was not the fault of the defendant. He was, therefore, legally excused from performance.

(d) **By Incapacity to Perform.**—In contracts for personal services there is always the implied condition that the party to render the services will be physically able to execute the contract by so doing. If one is incapacitated from rendering the service contracted for, by his own illness or by the illness or death of others upon whose personal services the contract was based, he will be excused from fulfillment of the contract, by the impossibility of carrying it out, owing to the incapacity stated.¹² The courts are usually liberal in construing this rule. The case of *Spaulding et al. v. Rosa et al.*,¹³ was decided upon this principle of law. In that case an opera company was discharged from liability on its contract to give a certain number of performances, on account of the sickness of its leading tenor and chief attraction, whose presence was regarded as of the essence of the

¹¹ 47 N. Y., 62.

¹³ 71 N. Y., 40.

¹² *Sween v. Gilbert*, 21 Wis., 401.

contract. In cases where a contract for personal services has been performed in part, before the incapacity has occurred, the party contracting for such services must recover for the portion rendered, on a quantum meruit—that is, upon the basis of what the service actually rendered is worth and not on the basis of the contract itself—as the contract, as stated, is discharged by the happening of the incapacity.

§92. **By Accord and Satisfaction.**—The legal notion of accord is a new agreement on a new consideration to discharge a debtor. It is not enough that there be a clear agreement, or accord, and a sufficient consideration, but the accord must be executed.¹⁴ Such an agreement carried out is called an Accord and Satisfaction. This may be defined as as a settlement of a claim by giving something different than that which was originally agreed upon, or, in the case of a disputed claim, by compromising the amount. By the accord the parties agree upon a sum of money or other matter to be given and accepted as compensation for the breach of a contract, instead of the legal remedy provided by law; and by the execution of the accord, that is, by the actual delivery and acceptance of the matter agreed upon, the right of action is satisfied and discharged. To operate as an accord and satisfaction it is necessary that an offer of money be accompanied by such acts and words as amount to a stipulation that if the money is accepted it is to be in satisfaction, so that the party to whom it is offered must understand that if he takes it he does so subject to such condition. Where a party believed that a claim against him had been fully paid, but finally sent a check for part of the amount with a statement that it was in “full settlement” and that he would “expect in return a receipt in full” and the check was retained but the party retaining it afterwards brought suit for the balance of his claim, it was held that the acceptance of the check resulted in an accord and satisfaction.¹⁵

It must be borne in mind that an accord is not a defense to the original debt unless the promisee therein agrees to accept the agreement itself in satisfaction of his debt; so that in case it is not performed his only remedy will be an

¹⁴ Hosler v. Hursh, 151 Pa. St., 415.

Hutten v. Stoddard, 83 Ind., 539.

¹⁵ Brown v. Symes, 31 N. Y. Sup., 629;

action for breach of the new agreement. There must be a valid agreement substituting a new cause of action in place of the old. Both the agreement and the consideration are new.¹⁶ In case a creditor accepts the liability of a third party in full satisfaction of a debt due him by another, this extinguishes the original debt. In order to have this effect, however, the liability of the original debtor must be completely cancelled and no right reserved against him. The acceptance, therefore, of the note of a third party by a creditor amounts to an accord and satisfaction of the debt for which the note was given.¹⁷ In such a case, however, it is possible that the acceptance of the note may be conditioned upon its payment and that if the note is not paid when due, the creditor may claim the full amount due him.¹⁸

§93. **Same—Subject-Matter.**—The subject matter of an accord and satisfaction may in general be anything of value. A mere expression of satisfaction does not amount to an accord and satisfaction. For example, in an action of trespass against one for taking another's horses the owner's statement that he was satisfied on receiving back his horses, could not be pleaded as an accord and satisfaction. The delivery of a promissory note to the maker, and the giving by him of another note in satisfaction, though of a less amount, discharges the former debt. A compromise of differences as to the amount due, whereby a less sum than that claimed is accepted in full discharge, bars any further claim. But where the amount due is undisputed, payment of a part of the debt is no consideration for a promise to treat the debt as thus paid, and the creditor can bring suit for the balance.¹⁹ The mere statement accompanying a check, that it is sent in settlement of an account for a larger sum, does not bind the creditor to treat it other than as a part payment by the debtor.²⁰

§94. **By Operation of Law.**—(a) **By Death.**—Death of either party terminates all contracts for personal services, or those involving personal relations, such as those for labor, professional services, personal skill, agency, partner-

¹⁶ Rogers v. City of Spokane, 9 Wash., 168; Kromer v. Heim, 75 N. Y., 574.

¹⁷ Hunter v. Moul, 98 Pa. St., 13; N. Y. Bank v. Fletcher, 5 Wend.,

85.

¹⁸ Sanders v. Bank, 13 Ala., 353; Conkling v. King, 10 Barb., 372.

¹⁹ Fuller v. Kemp., 138 N. Y., 231.

²⁰ Curran v. Rummell, 118 Mass., 482.

ship, and the like. Those contracts wherein only rights or interests in property are involved, are not usually affected by death, but must be performed by the deceased's estate.

(b) **By Receiving Better Security.**—The acceptance of a higher grade of security, in the place of a lower—the former being more effective in the eye of the law—extinguishes the lower, regardless of the intention of the parties. For this reason a judgment extinguishes a right of action,²¹ the former creating a greater and more binding obligation in law than the latter. This extinguishment is often called merger, but a strict interpretation of the word “merger” conveys the idea of absorbing rather than of discharging, and hence is not accurately used in this connection. To thus work a discharge it is essential that the superior security, or contract, be given to discharge the inferior rather than to be in addition thereto.²² Furthermore the subject-matter of, and the parties to, the contract must be the same.

(c) **By Unauthorized Alteration.**—If an alteration of a written contract by an addition or erasure is such that it changes the legal effect of the instrument, and is made with such intention by a party to the contract or his agent without the consent of the other party, the contract is discharged.²³ The alteration must be material,—such as changing the date of a note, or the time of payment;²⁴ adding to or withdrawing the name of the maker or drawer;²⁵ Adding or erasing words of negotiability;²⁶ or procuring the signature of a witness to a bond which was unattested at its date of execution, and the like.²⁷ It is not necessary that the alteration be prejudicial against the party whom it is sought to make liable; the simple fact of such alteration suffices.

(d) **By Bankruptcy.**—Bankruptcy or insolvency, discharges the person adjudged bankrupt or insolvent from contractual liabilities, when he is discharged by order of the court in which the bankruptcy or insolvency proceedings

²¹ *Hartford v. Street*, 46 Ia., 594; *Cole v. Favorite*, 69 Ill., 457.

²² *Martin v. Hamlin*, 18 Mich., 364; *Bill v. Porter*, 9 Conn., 30; *Andrews v. Smith*, 9 Wend., 53; *Horton v. Maffit*, 14 Minn., 289.

²³ *Lee v. Star Bird*, 55 Me., 491; *Ivory v. Michael*, 33 Mo., 398; *McGrath*

v. Clark, 56 N. Y., 34.

²⁴ *Crawford v. Bank*, 100 N. Y., 50; *Charlton v. Reed*, 61 Iowa, 166.

²⁵ *Henry v. Coats*, 17 Ind., 161; *Wallace v. Jewell*, 21 Ohio St., 163.

²⁶ *Davis v. Henry*, 13 Neb., 497.

²⁷ *Adams v. Frye*, 3 Metc. (Mass.), 103.

were pending. A detailed treatment of this subject will be taken up under the subject of "Bankruptcy."

(e) **By Statute of Limitations.**—Strictly speaking, mere lapse of time does not discharge a contract. However the right to sue on claims, is, by statute in every state known as the Statute of Limitations, limited to a prescribed term, which if invoked by the party to be charged, bars the right of recovery. Hence, if a defendant pleads this statute after lapse of the statutory time covering the claim sued on, the contract is, to all practical intents, discharged.²⁸

Claims against which the statutory time has run are commonly termed "outlawed." If part payment is made on such a claim, or a new promise to pay it is given, the claim is revived and the statute begins again to run against it from the time of such part payment or new promise.

§94. **By Breach.**—(a) **In General.**—Breach of a contract is brought about by the breaking of an obligation therein imposed. It always gives the injured party a right

²⁸ The statutory limit of the right to maintain legal action on various broken contracts, varies in the several states and territories, and as to different classes of obligations. The following table gives the existing terms, expressed in years for all jurisdictions.

States and Territories.	Open Acc't.	Notes & uns'led contracts	Judg'ts
Arizona	6	4	5
Alabama	3	6 (e)	20
Alaska	6	6 (e)	10
Arkansas	3	5	10
California	4	4 (o)	5
Colorado	6	6	20
Conn.	6	6	..
Delaware	3	6	10
D. C.	3	3 (f)	12
Florida	4	5 (h)	20
Georgia	4	6 (h)	7 (p)
Idaho	4	5	6
Illinois	5	10	20 (np)
Indiana	6	10	20
I. T.	3	5	10
Iowa	5	10	20 (n)
Kansas	3	5	5
Kentucky	5	15	15 (v)
Louisiana	3	5	10
Maine	6	6 (j)	20
Maryland	3	3 (f)	12
Mass.	6	6	20
Michigan	6	6	10
Minnesota	6	6	10
Mississippi	3	6	7
Missouri	5	10	10
Montana	5	8	10 (k)
Nebraska	4	5	10 (p)
Nevada	4	4	6

N. H.	6	6 (s)	20
New Jersey ...	6	6 (s)	20
New Mexico ..	4	6	7
New York	6	6 (s)	20 (l)
N. C.	3	3 (e)	10 (m)
N. D.	6	6	10
Ohio	6	15	15
Oklahoma	3	5	5 (t)
Oregon	6	6 (e)	10
Penn.	6	6 (h)	5
R. I.	6 (a)	6 (h)	20
S. C.	6	6	20
S. D.	6	6 (h)	20 (r)
Tennessee	6	6	10
Texas	2 (&)	4	10
Utah	4	6	8
Vermont	6	6 (y)	8 (l)
Virginia	2 (&)	5 (e)	10 (s)
Wash.	3	6	6
W. Va.	5	10	10 (s)
Wisconsin	6	6 (h)	20 (r)
Wyoming	8 (u)	5 (u)	21

(A) Between merchants, 20 years. (E) Under seal, 10 years. (F) Under seal, 12 years. (H) Under seal, 20 years. (I) Under seal, or not negotiable, 17 years. (J) Witnessed, 20 years. (K) Justice, 5 years. (L) Justice, 6 years. (M) Justice, 7 years. (N) Justice, 10 years. (O) Foreign, 2 years. (P) Foreign, 5 years. (R) Foreign, 10 years. (S) Foreign, same as State where rendered, but not over 10 years. (T) Foreign, 1 year. (U) On debts or judgments incurred before debtor became resident, suit must be begun within 1 year after residence is secured. (V) From date of last execution. (Y) Witnessed, 14 years. (&) Store accounts, other accounts 3 years. Accounts between merchants, 5 years.

of action, and often discharges the contract entirely. In the latter case either party cannot procure performance by the other, as the courts have nothing upon which to base a legal remedy. This form of discharge is more often applicable to certain terms or provisions of a contract, rather than to the contract as a whole. In such case the contractual relation is not extinguished unless the particular provision is sufficiently important to destroy the effect of the entire agreement.

(b) **Renunciation.**—Renunciation of a contract, in order to give a right of action immediately upon the refusal of performance, must be distinct and unequivocal; must be acted upon by the promisee as an absolute refusal; and must work a prejudice to him. The act of renunciation consists in doing something inconsistent with the contractual relation, or making a positive statement, capable of being proved, of an absolute refusal to perform. It may justify the other party in treating the contract as rescinded, and excuse him from performance of his part, before taking proceedings against the renunciator to enforce his rights. It may also prevent the renunciator from afterwards continuing the contract by withdrawing his refusal to perform if the other party has, in the meantime, acted upon such disavowal.

If the renunciation by a buyer in a contract of purchase, does not occur until after performance by the other party has begun, and such renunciation is a refusal to perform the remainder of the contract by refusing to receive the balance of the goods, the seller is exonerated from farther performance and may bring an action against the buyer immediately for the goods already delivered and for the loss of profits on the balance refused. Such were the facts and ruling in *Hale et al., v. Trout et al.*,²⁹ in which the plaintiffs brought an action for the price of lumber already sold and delivered under an installment contract, and for damages for breach of the contract. Judgment was rendered in favor of the plaintiffs upon the ground that they need not deliver the balance of the lumber after the purchasers' absolute refusal to accept it, but, having stood ready to perform, had a right to sue upon the contract for loss of profits thereunder and

²⁹ 35 Cal., 229.

to recover accordingly.

From the foregoing it is apparent that a contract may be renounced while it is yet executory, and before any performance on either side is due; and the injured party may treat the contract as discharged.

(c) **By Impossibility, or Failure, to Perform.**—Inability, or refusal, to perform a contract in part or in whole is, of course, not an actual breach until the contract time of performance arrives. However, where one has voluntarily put it out of his power to perform, even though the time of performance is not due, the contract may be treated by the other party as discharged and bring an action thereon immediately. In cases where demand is necessary before performance is due, and performance is impossible because of the promisor's act, the courts have held that demand need not be made before suit.³⁰

In the case of *Woolner et al., v. Hill et al.*,³¹ the plaintiffs contracted with the defendants to buy a certain quantity of alcohol, to be delivered at the rate of 500 barrels per month, payment on delivery. Defendants, one month after the execution of the contract, made a general assignment in favor of creditors. Plaintiffs brought action for breach of contract and the defendants defended on the ground that no demand or tender was made by the plaintiffs before suit. The court held that the defendants having voluntarily disabled themselves from performing the contract by making the assignment could not require tender or offer of performance by the plaintiffs, who stood ready to perform, and that in such cases a demand is not necessary.

³⁰ *Boyle v. Guysinger*, 12 Ind., 273; ³¹ 93 N. Y., 576.
Smith v. Jordan, 13 Minn., 264.

QUIZZER.

DISCHARGE OF CONTRACTS.

- 1-§86. What is meant by the discharge of a contract?
- 2- How may a contract be discharged?
- 3- Name the different ways in which this may be accomplished.
- 4- What does the consideration of the discharge of contracts involve?

- 5- What is the general rule as to when rights of action on contracts accrue?
- 6-§87. Describe the simplest form of the discharge of contracts.
- 7- What discharges a contract based upon an executed consideration?
- 8- Does performance by one party, where a promise is given for a promise, discharge the contract?
- 9-§88. Define a release, or rescission, of a contract.
- 10- What is the effect on a contract of a release thereof?
- 11- Upon what class of contracts is such an agreement binding—and when?
- 12- What is necessary in such agreement to release a right of action which has accrued on a contract?
- 14- What is an essential factor of a contract of release?
- 15- What distinction, as to necessity of additional consideration, is there between mutual releases and those running only to one party?
- 16- Can written contracts be released by parol—Can sealed instruments—and why?
- 17- Is a parol release without consideration valid?
- 18- What is the effect on a contract of the surrender of the evidence of indebtedness to the maker?
- 19- What is necessary to make such a surrender a valid discharge?
- 20-§89. What effect on a contract does the material changing of its terms have?
- 21- What is necessary to cause such change to work a discharge, and how can it be done?
- 22- How does the substitution of new terms in a contract differ from waiver?
- 23- Give illustrations of a change in contract-terms not affecting its discharge.
- 24- Under what circumstances would alterations in a contract annul it?
- 25-§90. Can a contract contain elements of its own cancellation? If so name some.
- 26- When does non-fulfillment of a contract, contemplated by the contract itself, impose no liability?

- 27- What is a condition subsequent, and when does it affect a contract?
- 28- Give an example of a contract containing such a condition—describe fully.
- 29- What implied events in contracts may terminate them?
- 30- Give an instance of contracts containing an optional termination.
- 31-§91. What can you say as to impossible conditions in contracts and their effect thereon?
 - (a)
- 32- What, likewise, as to contracts possible in themselves, but not performed through inevitable accident.
- 33- How can one protect himself from liability under such circumstances?
- 34-(b) Does legal impossibility to perform a contract ever discharge from liability thereon—if so when?
- 35-(c) What effect on a contract does destruction of its subject matter have?—state fully.
- 36- State the facts and the decision in the case of *Dexter v. Norton*.
- 37-(d) Does incapacity to perform a contract ever work its discharge—if so what contracts, and when?
- 38- How do courts usually construe personal service contracts?
- 39- What is the rule as to recovery under such contracts where they have been partially performed?
- 40-§92. Give the legal notion of accord and satisfaction.
- 41- Define accord and satisfaction.
- 42- What do the parties thereto agree?
- 43- What is necessary to make an offer operate as an accord and satisfaction?
- 44- Give an illustration where the retaining of a check so operated.
- 45- When is an accord and satisfaction a sufficient defense?
- 46- What effect on a debt has the acceptance by the creditor, of the liability, therefor, of a third party?
- 47- What is necessary in order to work such effect?

- 48- Does the taking of a third party's note have the same effect?
- 49- Does the question of the payment or non-payment of such note at all affect the matter—if so how?
- 50-§93. What may be the subject matter of an accord and satisfaction?
- 51- Does simply expressing one's self as satisfied with a certain thing, work an accord and satisfaction?—give examples.
- 52- Does delivery and acceptance of a note for an amount less than the full claim discharge the debt?
- 53- What can you say as to the discharge of a debt upon payment of a lesser sum in cases of a disputed, and those of an undisputed, amount of indebtedness?
- 54- Is a creditor bound by the statement accompanying a check for a lesser sum than the debt, that it is sent in full settlement?
- 55- What may he do with such a check?
- 56-§94 What contracts does death wholly terminate?
- 57-(a) What contracts, if any, continue in force after death of a party thereto?
- 58-(b) What effect does the obtaining of a higher grade of security have upon the lesser in a contract?
- 59- What effect upon a right of action has a judgment thereon?
- 60- What is such extinguishment often called, and is such designation accurate—and why?
- 61- What is essential to have a superior security work a discharge of an inferior one?
- 62-(c) Does the unauthorized alteration of a contract affect it—if so, how, and what is essential to such result?
- 63- Name several kinds of alterations that will discharge a contract.
- 64- Does the intention with which such alterations are made affect the legal effect?
- 65-(d) What effect on contract liability does bankruptcy have?

- 66-(e) Does lapse of time ever, strictly, discharge an obligation?
- 67- What right arising from contract may lapse of time affect—and how?
- 68- Describe the Statute of Limitations.
- 69- What term is commonly applied to obligations against which such statutory time has run?
- 70- What will revive an “outlawed” claim?
- 71- From what time will such statute again begin to run?
- 72-§95 How are breaches of contracts brought about?
- 73-(a) What right, and to whom, does the breach of a contract give?
- 74- What other effect does such breach sometimes have?
- 75-(b) What is the renunciation of a contract?
- 76- What is necessary to give an immediate right of action thereon?
- 77- In what does the act of renunciation consist?
- 78- What effect upon the other party may the renunciation by one have?
- 79- What effect on a seller’s rights and liabilities has the refusal of a buyer to receive all goods bought?
- 80- What were the facts and the judgment in the case of *Hale v. Trout*?
- 81- When, only, can a contract be renounced?
- 82- How may the injured party treat a renounced contract?
- 83-(c) When does inability or refusal to perform constitute a breach of contract?
- 84- What is the rule where one voluntarily incapacitates himself from fulfilling a contract before time of performance is due?
- 85- Give the facts and judgment in the case of *Woolner v. Hill*.
- 86- What were the court’s holdings in that case?—be specific and full.

Answer 5-30-11

LESSON 9.—

CHAPTER XII.

ACTIONS AND DEFENCES.

- §96. When Right of Action Accrues.
 97. Election of Remedies.
 98. Defences To Actions on Contracts.
 99. Duress.
 (a) Definition.
 (b) Of Persons.
 (b) Of Goods.
 (c) Of Goods.
 100. Fraud.
 (a) Definition.
 (b) Distinctions.
 (c) Essential Features.
 (d) Falsity of Representation.
 (e) Nature of Misrepresentation.
 (f) Reliance on False Statements.
 (g) Intention That Statement be Acted Upon.
 (h) Statement to Third Party.
 (i) Damage.
 (j) Remedies.
 101. Misrepresentation.
 (a) Distinguished From Fraud and Mistake.
 (b) Essentials.
 (c) Matters of Opinion.
 (d) True Statement—Knowledge of Facts.
 (e) Materiality.
 (f) Effect in General.
 (g) Effect in Law.
 (h) Effect in Equity.
 102. Mistake.
 (a) In General, and Definition.
 (b) As to Subject Matter.
 (c) Ignorance of Law.
 (d) As to Identity of Party.
 (e) Effect.
 103. Undue Influence.
 (a) Nature.
 (b) Effect and Remedy.

§96. **When Right of Action Accrues.**—The mere fact that a person has entered into a contract with another can give no cause of action, and none can arise, until there is some breach of such contract, which, therefore, must be regarded as the cause of action. The contract may give a party the right to demand its performance according to its terms, but there is no delict, and no cause of action, until the other party refuses or neglects to perform some duty required of him by the terms of the contract.¹

§97. **Election of Remedies.**—It frequently happens that as the result of certain breaches of contract—more par-

¹ Tillingham v. Boston & P. R., Lum ber Co., 39 S. C., 484.

ticularly, perhaps, in those cases of breaches of contractual obligations created by law, and of obligations imposed by law, in addition to those voluntarily assumed by parties to the contract itself—the party injured by the breach has more than one kind of remedy, or of action, available for his redress. In such cases he has, of course, a choice of remedies, but he must make a choice; he cannot pursue two actions at the one time upon the same cause of action.² This matter is one of legal procedure rather than of substantive law and hence is not properly within the scope of the present lesson. It will be fully treated under the subjects of Actions and of Election of Remedies, in the second year's lessons.

§98. **Defences to Actions on Contracts.**—The defence to an action on contract must necessarily be based upon some fact or factor arising from the contract itself, either in connection with its inception or consummation, or incorporated therein. Several items of possible defence having special reference to the competency of parties; the fact, sufficiency, or failure of consideration; the legality of the purpose of the contract, and the like, have been presented in our discussion of those topics. In addition, there are several other matters, any of which, if present in the contractual relation, renders the contract thereby affected, void or voidable, at the instance of the injured party, and which he can, therefore, invoke in absolute and total defence of the contract if he elects to avoid it. The principal matters of this character are duress, fraud, misrepresentation, mistake and undue influence.

§99. **Duress.**—(a) **Definition.**—Duress consists of actual or threatened violence or imprisonment. There may be duress of person, or duress of goods, either of which if effectually exercised will be sufficient ground of avoiding a contract made because of its influence upon one. Duress of the person is of two kinds: (1) duress of imprisonment—which is compulsion through an actual illegal restraint of one's personal liberty; and (2) duress of mind,—which is compulsion through creating a rational fear of loss of life, of bodily injury, or by actual confinement.

² *Peters v. Bain*, 133 U. S., 670; *Haydock v. Cooper*, 53 N. Y., 68.

(b) **Of Person.**—An unlawful imprisonment of a party, or his lawful imprisonment through abuse of legal process; imprisonment of a near relative of his to whom he owes some legal duty; or unlawful and great bodily harm to him or to such relative; or the threatening of such imprisonments or harm, is duress of person. Duress, therefore, can arise from either force or fear. It has been held in several states that, although an imprisonment be legal, if the process be sued out maliciously and without probable cause, the party imprisoned was under duress.³ The contracting party, or some one of his immediate family, must be the subject of the duress, and it must be the act of the other party to the contract, or of his agent.⁴ A contract entered into in order to relieve a third person from duress is not voidable on that ground, although release from duress as a consideration for a contract is unreal consideration and vitiates a simple contract for that reason.

(c) **Of Goods.**—The unlawful detention, seizure or destruction of the property of another is duress of goods.⁵ Such duress exists when one is compelled to submit to an illegal exaction in order to obtain his property from one who refuses to surrender possession unless the exaction is endured.⁶ This form of duress is not, in itself, ground for avoiding a contract, but if the detention is obviously without right, a promise based upon such detention is void for want of consideration. Money paid for the release of goods from duress may be recovered as money had and received by the other party which rightfully belongs to the one making the payment. The party pleading duress as a defense must show clearly that he was actually influenced by it, and not by any other cause in doing the thing from which he now invokes belief.⁷

§100. **Fraud.**—(a) **Definition.**—Fraud is a false representation of a material fact, or the non-disclosure of a material fact under such circumstances that its concealment

³ *Severance v. Kimball*, 8 N. H., 386;
Watkins v. Baird, 6 Mass., 506;
Strong v. Grannis, 26 Barb. (N. Y.), 122; *Bowker v. Lowell*, 49 Me., 429; *Taylor v. Cottrell*, 16 Ill., 93.

188; *Shattuck v. Watson*, 53 Ark., 147.

⁵ *Benjamin on Sales*, §60.

⁶ *Hackley v. Headley*, 45 Mich., 570;
Scholey v. Mumford, 60 N. Y., 498.

⁴ *City Nat. Bank v. Kusworn*, 88 Wis.,

⁷ *Hines v. Cours*, 93 Ind., 266.

amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, to one who did not know that it was false, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury.

The common law defined fraud in an exact and precise sense which allowed no flexibility of meaning; but in equity, any unfair dealing which is ground for equitable relief is called fraud, and the courts of equity have carefully refrained from confining this idea within the limits of a definition. This has given rise to what is termed constructive fraud.⁸ Inasmuch as this branch of fraud is peculiarly applicable to cases of trust relations, it will be treated under the subject of Equity Jurisprudence.

(b) **Distinctions.**—Fraud differs from mistake in that in fraud the statement of the adversary party is the cause of the false impression, while this is not the case in mistake. It differs from misrepresentation in that a misrepresentation is made by one who believes it to be true and is justified in such belief by reason of the surrounding circumstances, while fraud is committed by one who knows that his statement is false, or who makes it positively without reasonable grounds for believing it to be true.

Some authors treat the non-disclosure of material facts as distinct from fraud,⁹ but the better reasoning seems to be that non-disclosure amounts to fraud, unless there is no legal duty to speak, and the party is not bound by good faith to disclose. Otherwise, the non-disclosure, or concealment, is equivalent to a false representation. In other words, mere silence, or non-disclosure of facts, will not invalidate a contract, whatever may be the intention in failing to make the disclosure, except in contracts made between parties where full faith requires it. It is evident that non-disclosure, as a legal term, is meaningless unless certain facts exist that by right ought to be disclosed; and such is the case only in contracts requiring such good faith.¹⁰

(c) **Essential Features.**—To constitute legal fraud, the representation must be (1) false,—which includes non-disclosure where active steps are taken to prevent discov-

⁸ *Meldrum v. Meldrum*, 15 Colo., 478.

¹⁰ *Keats v. Lord Cadogan*, 10 C. B.

⁹ Page on Contracts, p. 99, Sec., 56.

591.

ery, or where there is a duty to disclose the facts suppressed; (2) it must be of a past or existing fact; (3) it must be of a material fact; (4) it must be such that the other party has a right to rely on it, or is compelled to rely on it; (5) it must be made with a knowledge of its falsity, or in reckless disregard of whether it be true or false; (6) it must be made directly to the other party or intended to reach him so that he will act upon it; (7) he must be actually deceived thereby; and, (8) it must result in an injury.

Under the subject of Mistake, fraud in the factum—or in the actual drawing up of a contract—will be touched upon. In such cases, it will be seen that the contract is generally held to be void, and cannot be rescinded, because there is, legally, nothing to rescind. It is simply annulled, and the defrauded party is placed in his original position. Thus, substituting a quit-claim deed for a mortgage;¹¹ or inserting, without the knowledge of the other party, a clause making a certain pledge collateral security for all debts owing, instead of for only the debt in question;¹² or a false statement as to the manner of payment in a written order;¹³ each makes such instruments void. Under the present treatment of the subject, fraud is considered only in those cases whereby one, knowing the parties, consideration and subject-matter, is induced to enter into a contract by false representations of the other party.

(d) **Falsity of Representation.**—The form in which a false representation is made is immaterial. It may consist of an actual false statement; of statements partly true but framed so as to mislead; or of either words or conduct which prevent the other party to the contract from discovering the truth. There is no difference in principle between fraud in fact and fraud in law. Where the direct and inevitable consequence of an act is to delay, hinder, or defraud creditors, the presumption at once conclusively arises that such illegal object furnished one of the motives for doing it, and it is thus, upon this ground, held to be fraudulent.¹⁴ Many of the cases illustrating this principle are also examples of active concealment. Thus fraud was held to exist where a

¹¹ *Givan v. Masterson*, 152 Ind., 127.

St., 165.

¹² *Haldeman v. Bank*, 19 Ky. L. R., 1691.

¹⁴ *Robinson v. McKenna*, 21 R. I., 117.

¹³ *Clinch, etc. Co., v. Willing*, 180 Pa.

judgment of over seven thousand dollars was bought for four hundred dollars, the vendee not disclosing that the judgment debtor was dead, leaving an estate worth six thousand dollars.¹⁵

In contracts of sale, disclosure is not ordinarily incumbent on the seller. The rule is, *caveat emptor*—"let the buyer beware."¹⁶ Even if the contract is one which by the statute of frauds must be in writing, or some note or memorandum thereof must be in writing, oral misrepresentation, if containing the other elements of fraud, constitutes ground for recovering money paid under an executed contract.

(e) **Nature of Misrepresentation.**—A mere expression of opinion, belief or expectation, however unfounded, will not invalidate a contract, nor give cause for an action for deceit. Notwithstanding this, a representation of an intention, may amount to a fraudulent representation. Representations of fact may be better illustrated by examples than by an abstract rule. Thus, statements that a water-right is sufficient to irrigate all the land sold;¹⁷ or that a stream never overflowed on the land sold;¹⁸ or that a certain amount of hay has been cut from the land;¹⁹ or that a patented article has had a certain sale;²⁰ are material representations. On the other hand, a statement which amounts to a mere speculation, or, even a statement of a material fact which is given as a matter of belief only, are considered as opinions.

(f) **Reliance on False Statement.**—In order that a person may be entitled to rescind a contract or maintain an action for deceit in procuring same, the false representations must have been of such a character, and made under such circumstances, that he had a right to rely on them. If the party who claims to have been misled acted when he did not know that such false statement had been made;²¹ or if he disbelieves the statements at the time of the alleged

¹⁵ *Gottschalk v. Kircher*, 109 Mo., 170. Vendee further represented that the judgment-debtor was alive and execution-proof. See also *Roseman v. Canovan*, 43 Cal., 110; *George v. Johnson* 6 Humph., (Tenn.), 36; *Coles v. Kennedy*, 81 Iowa, 360.

¹⁶ *Laidlaw v. Organ*, 2 Wheat., (U. S.,) 178.

¹⁷ *Hill v. Wilson*, 88 Cal., 92.

¹⁸ *Oakes v. Miller*, 11 Colo. App., 374.

¹⁹ *Coon v. Atwell*, 46 N. H., 510.

²⁰ *King v. White*, 119 Ala., 429.

²¹ *Burnett v. Hensley*, 118 Ia., 575.

fraud; ²²he cannot be said to be defrauded. One to whom false statements are made and who believes them in spite of information to the contrary received from others may in law be justified in relying thereon and may hold the party making such statements, liable for fraud. ²³ It is necessary that the false representation be the sole motive which influenced the party to whom it was made. ²⁴

The courts are somewhat indefinite as to the necessity of investigation by the person to whom the representation is made. It is clearly settled however, that negligence, on the part of the person to whom the false statements are made, in investigating the truth thereof, is no defense for the other party in an action of fraud brought by such former person, on the contract. ²⁵ Many cases hold that where the facts are generally accessible to both parties, public policy demands that the law should require persons to whom representations are made to use all reasonable means to determine the truth, and that a failure to investigate may amount to inexcusable negligence precluding the negligent party from obtaining relief. ²⁶

(g) **Intention That Statement Be Acted Upon.**—It is not necessary that the intention be to deceive. If the statement has had the elements of fraud hitherto discussed, it is sufficient if the party making it intends it to be believed, and action by the other party in reliance thereon, to be taken. ²⁷ Thus if he knows the statement is false but believes that it will come true thereafter, he is guilty of fraud. ²⁸

(h) **Statement to Third Party.**—As a general rule, unless the person making the false statement intends to induce action by a particular person, who in fact acts thereon, legal fraud does not exist. So, if A makes a false statement to C, B's agent, to induce B to act thereon, this is fraud if it would be fraud had A made the statement to

²² City National Bank v. Hickox, 4 Johns., (N. Y.,) 212.

²³ Morrill v. Palmer, 68 Vt., 1; Virginia Land Co. v. Haupt, 90 Va., 533.

²⁴ Sioux National Bank v. Bank, 56 Fed., 139; Sprague v. Taylor, 58 Conn., 542.

²⁵ Strand v. Griffith, 97 Fed., 854.

²⁶ Andrus v. Refining Co. 130 U. S., 643. Such is the law in Ariz., Ark., Cal., Ga., Ida., Ill., Ia., Ky., Me., Md., Mass., Mich., Minn., Mo., N. H., N. Y., Or., Pa., Utah., Va., Wash., and Wis.,

²⁷ Sukeforth v. Lord, 87 Cal., 399; Mooney v. Davis, 75 Mich., 188.

²⁸ Reid v. Cowduroy, 79 Ia., 169.

B in person.²⁹ Or, if A make a false statement to B in X's presence, intending that X shall hear and act upon such statement, A is guilty of fraud toward X.³⁰ A statement made to the general public may amount to fraud. For instance, a false statement in the advertisement of a sale may be a fraud.³¹

(i) **Damage.**—Fraudulent representations may not result in injury, and in such case legal fraud does not exist. False representations to induce one to do a legal duty;³² or to pay his own debt;³³ or to sell his property for its full value;³⁴ are illustrations of this condition. It is clear and logical that one who wishes to recover damages must show damages, but most courts hold that false representations, made knowingly with intent to deceive, causing deception and thereby inducing one to make a contract that he would not otherwise have made, are grounds for rescission though no actual damage follows.³⁵

(j) **Remedies.**—Apart from contract, a person injured by fraud may bring an action at common law for deceit, and is entitled to such damages as he has sustained. Courts of equity will, also in like manner, grant relief from misrepresentation or fraud, by compelling the defendant to make good the loss sustained by the plaintiff. These rules apply to fraud arising *ex delicto*,³⁶ being in the nature of a tort. The rules with regard to rights in cases of fraud arising *ex contracts*,³⁷ are particularly effective as concerns the affirmation or avoidance of a contract.

Upon discovery of the fraud, the injured party may (1) affirm the contract and sue for the damages sustained; or (2) he may repudiate the contract and resist an action upon it at law or in equity. In case of repudiation, the party rescinding may in equity, obtain a cancellation of the contract.

As a general rule, the right to recover damages is de-

²⁹ Schofield v. Schofield, 77 Conn., 1; Hubbard v. Weare, 79 Ia., 678.

³⁰ Brown v. Brown, 62 Kan., 666.

³¹ Hadley v. Importing Co., 13 Ohio St., 502.

³² Deobold v. Opperman, 111, N. Y., 531.

³³ Brown v. Blunt, 72 Me., 415.

³⁴ Potter v. Lumber Co., 105 Wis., 25.

³⁵ Baker v. Maxwell, 99 Ala., 558; MacLaren v. Cochran, 44 Minn., 255; Harlow v. LaBrun, 151 N. Y., 278; Williams v. Kerr, 152 Pa. St., 560.

³⁶ From a wrong.

³⁷ From a contract.

pendent upon restoration of the money or goods obtained under the contract. On the other hand, the right to avoid a contract is limited in certain ways. It is true that a person may keep the contract open until he is sued upon it, and that a plea of fraud then set up is a sufficient ground for rescission; but, in thus postponing his repudiation, the courts may decide that he has waived his right to take advantage of the fraud by not exercising his option to rescind; or by accepting some benefit under the contract after he has become aware of the fraud; or by reason of the fact that innocent third parties have since acquired an interest, for value, under the contract. It must be borne in mind that the contract, until the defrauded party has made his election, is voidable and not void. If the right to avoid is lost, the person upon whom the fraud has been practised must resort to his action for damages for the tort.

§101. **Misrepresentation.**—(a) **Distinguished From Fraud and Mistake.**—Misrepresentation is an innocent false statement of a material fact made by one party to a contract to the other party or parties, with the intention of influencing the latter's action. It is to be distinguished from mistake in that the erroneous belief in misrepresentation is due to the false statement of one of the parties to the contract, while in mistake such erroneous belief must be due to some other cause. It is distinguished from fraud in that in fraud the party making the false statement has actual or constructive knowledge of its falsity and makes the statement with intent to deceive the person to whom it is made. Legal misrepresentation is essentially a bona fide misstatement. Some authorities treat it as in part mistake and in part fraud,³⁸ but it is best discussed as a separate topic.

Misrepresentation is often confused with "condition" or "warranty" in a transaction. In case of doubt, the test is:—Is the misstatement a part of the contract? If so, it is a condition or warranty, and its falsity does not affect the formation of the contract, but operates to discharge the injured party from his obligation, or to give him a right of action based on the contract.

³⁸ Taylor v. Ford, 131 Cal., 440.

(b) **Essentials.**—To constitute misrepresentation, the statement must be one of fact; it must be false; it must have been believed in and acted upon by the party to whom it is made; and, although it may exist in the ordinary sense of the term, it has no legal existence, unless it is a misstatement of a material fact.

(c) **Matters of Opinion.**—Mere matters of opinion or of hearsay, cannot constitute misrepresentation. Thus, statements as to the opinion of the value of certain book accounts,³⁹ or of certain property,⁴⁰ are not legal misrepresentations.⁴¹

(d) **True Statements—Knowledge of Facts.**—It is evident that a true statement of fact is not a misrepresentation. Also, if the person to whom the representation is made is informed of the facts, no legal misrepresentation exists.⁴² So a false statement made after the transaction is entered into cannot be legal misrepresentation.⁴³ Nor is a false statement as to the condition of a business, misrepresentation, if the facts in question are shown by the books of the business and the party to whom such representations are made examines such books.⁴⁴ It has been held that misrepresentation is not operative if both parties have an equal opportunity to know the truth.⁴⁵

(e) **Materiality of Facts Stated.**—Finally, the misrepresentation, in order to be operative, must be a misstatement of a material fact. For example, in a contract for the sale of realty, a representation by the vendor that the area of the tract is substantially greater than it really is, is ground for a rescission of the contract.⁴⁶ On the other hand misrepresentation as to an immaterial fact has no legal effect. Thus where a surety, signing a note as an accommodation, is told that the note signed by him is a renewal of a former note, when in reality it is to cover an overdraft, legal misrepresentation does not exist.⁴⁷ Such misstatement does not affect the subject-matter or change the surety's liability in the least.

³⁹ *Kenton Ins. Co., v. Wiggington*, 89 Ky., 330.

⁴¹ *Dooley v. Insurance Co.* 16 Wash., 155.

⁴² *Wright v. Phipps*, 90 Fed. 556; *Patton v. Glatz*, 87 Fed. 283.

⁴³ *Commercial Bank v. Insurance Co.*,

87 Wis., 297.

⁴⁴ *Colton v. Stanford*, 82 Cal., 351.

⁴⁵ *Mamlock v. Fairbanks*, 46 Wis., 415.

⁴⁶ *Newton v. Tolles*, 66 N. H., 136.

⁴⁷ *Deposit Bank v. Peak*, 110 Ky., 579.

(f) **Effect in General.**—The party seeking relief must, by reason of the particular misrepresentation, have received some right, or incurred some liability, substantially different from that so represented to him. In order to be effective as grounds for avoiding a contract, the misrepresentation must have been made by the party against whom relief is sought, or by some one acting on his behalf.

In a certain class of contracts,—sometimes referred to as *uberrimae fide*,⁴⁸—in which, from their nature, or from the particular circumstances, one party must wholly rely upon the other for his knowledge of the facts, there is an exception to the general rule that a misrepresentation not amounting to fraud, and not constituting a material fact, does not vitiate the contract. Instances of such contracts are those of insurance, contracts between attorney and client, principal and agent, guardian and ward, and, to a limited extent, contracts for the sale of land, and contracts to purchase shares in stock companies.

(g) **Effect in Law.**—At common law, as uninfluenced by equity, the original rule seems to have been that misrepresentation which did not affect the formation of the contract, and was not made a condition thereof, had no effect on its validity, even though it concerned a material fact. An action of deceit could not be brought on an innocent misrepresentation, in the great majority of jurisdictions.⁴⁹ Nor could a contract induced by an innocent misrepresentation be rescinded. Many jurisdictions now allow this form of action if the misrepresentation, though innocent, are material and damaging.⁵⁰

(h) **Effect in Equity.**—In equity, the weight of authority is that rescission may be allowed to one who is induced to enter into a contract by misrepresentation of a material fact.⁵¹ Thus, bona fide material misrepresentations as to the value of collateral security of a note;⁵² or as to the fact of land being oil bearing;⁵³ or as to the amount

⁴⁸ "Of the utmost good faith."

⁴⁹ *Dushane v. Benedict*, 120 U. S., 630; *Nash v. Trust Co.*, 163 Mass., 574.

⁵⁰ *Totten v. Burhans*, 91 Mich., 495; *Bennett v. Judson*, 21 N. Y., 238; *Loper v. Robinson*, 54 Tex., 510;

Gunther v. Ulrich, 82 Wis., 222.

⁵¹ *Johnson v. Bnt*, 93 Ala., 160; *Jones v. Foster*, 175 Ill., 459.

Borders v. Kattleman, 142 Ill., 96.

⁵³ *Braunschweiler v. Waits*, 179, Pa. St., 47.

of debts owing by the vendee who seeks credit;⁵⁴ are each ground for rescission in equity.

The combined effect of the equitable rule allowing rescission for a material misrepresentation, and the common law rule which treats misrepresentation as a fraud, is gradually establishing a doctrine at common law that such a misrepresentation is ground for an informal rescission at law.⁵⁵ Thus, an innocent misrepresentation as to the amount of timber on property conveyed;⁵⁶ or as to the extent of physical injuries;⁵⁷ are held sufficient to enable the party misled thereby, to avoid the contract which he has been so induced to make. So far as the remedy is concerned, if the false statement is sufficient to avoid the contract, it makes little difference whether it is a case of misrepresentation or of fraud.

§102. **Mistake.**—(a) **In General and Definitions.**—

It must be borne in mind that this subject has to do with mistake of intention, and not mistake of expression, which amounts to incorrect construction. In the latter case, the court will usually correct the contract providing that proof of the mistake in expressing the real intention of the parties to the contract, is clear and convincing. Legal mistake, contrary to legal fraud, renders a contract void, and not voidable. Mistake, to have this effect, must be mutual, both parties must have equally shared therein, or there must have been mistake on one side and fraud on the other.

Mistake, in the broad legal sense of the term is "that result of ignorance of law or of fact, which has mislead a person to commit that which, if he had not been in error, he would not have done."⁵⁸ A mistake of a fact is an unconscious ignorance, or forgetfulness, of the existence or non-existence of a fact, past or present, material to the contract.⁵⁹

(b) **As to Subject Matter.**—Mistake as to subject matter will avoid a contract when the subject-matter, unknown to the parties, did not, or has ceased to, exist; or when the parties confuse the identity of the subject-matter; or

⁵⁴ *Ernst v. Cohn*, 62 S. W. (Tenn.), 186.

⁵⁶ *McKinnon v. Vollmar*, 75 Wis., 82.

⁵⁷ *Wilcox v. Railway*, 111 Fed., 435

⁵⁸ *Jeremy Eq. Juris.*, 358.

⁵⁹ *Pomroy Eq. Juris.*, §839.

⁵⁵ *Ruff v. Jarrett*, 94 Ill., 475; *Mooney v. Davis*, Mich., 188.

mistake, mutually, as to its true condition. One of the leading English cases on the subject of a non-existing subject-matter arose out of a sale of cargo of corn which was supposed, by the parties at the time of the sale, to be on its voyage to England, but which, in fact, having become heated while out at sea, had been unloaded and sold. It was held that the contract was void, inasmuch as it "plainly imported that there was something which was to be sold at the time the contract was made and something to be purchased," whereas the object of the sale had in fact ceased to exist.⁶⁰

The inducement to execute the contract must have been such that ordinary diligence could not discover the error.⁶¹ An interesting case illustrative of a mistake as to the nature of the subject-matter is where the defendant sold and delivered to the plaintiff a thorough-bred cow for the sum of \$80, both parties to the contract supposing the cow was barren. Before the time for the performance of the contract by delivery of the cow arrived, the defendant discovered that she was with calf, whereupon he rescinded the sale and declined to deliver. As a breeder the cow was worth from \$750 to \$1000. Plaintiff brought a suit in replevin to get possession of the animal, claiming title under the sale. The court held that the right of rescission was properly exercised by the defendant, and that the mistake or misapprehension of the parties as to the actual condition of the cow went to the whole substance of the agreement.⁶² In cases in which one's contract is to supply a certain article absolutely, and not impliedly conditional upon its existence, the rule is otherwise.⁶³

(c) **Ignorance of Law.**—Mistake of law, by reason of which the parties did not understand the legal effect of their contract does not void it. Mistake of a foreign law, however, is a mistake of fact, and will vitiate the contract.⁶⁴ Of course, in cases of fraud, or of violation of confidence,

⁶⁰ *Conturier v. Hastie*, 5 H. L. Cas., 673; and see, *Ketchum v. Catlin* 21 Vt., 191.

⁶¹ *Gibbs v. Linabury*, 22 Mich., 479; *Cline v. Guthrie*, 42 Ind., 236; *Walker v. Ebert*, 29 Wis., 194; *First National Bank v. Leerman*, 5

Neb., 247.

⁶² *Sherwood v. Walker*, 33 N. W. Rep., (Mich.), 919.

⁶³ *Perkins v. Say*, 3 Serg. & R., (Pa.), 327.

⁶⁴ *Haven v. Foster*, 9 Pick., (Mass.), 112.

even though coupled with a mistake of law, the contract may be set aside.⁶⁵

(d) **As to Identity of Party.**—Honest mistake as to the person with whom one is contracting will release one from such contractual obligations. Justice Cooley once said: "No man can be compelled against his will to accept another contracting party in place of the one he has dealt with, even though a contract with such other party may be equally valuable, and in its results exactly the same."⁶⁶ This mistake is often brought about by the substitution of one party for another under a contract without notice to the real party in interest.⁶⁷ Also where one party, claiming to be some one other than he is, procures a promise, as of marriage; or obtains a contract of any other kind that would not otherwise have been given him.

(e) **Effect.**—The effect of mistake is to render the contract void. If the contract is executed in whole or in part the amount paid, or the other consideration given, under it may be recovered where, however, the mistake is the direct result of fraud, the contract is rendered voidable only. In the case of executory contracts, the mistaken party may repudiate and successfully defend an action brought upon it. These rules are applicable only where the mistake is such as to effect the essential elements of the contract. Mistake in the inducement—or an erroneous belief as to a collateral, although material, fact which does not affect a knowledge of the existence and identity of the essential elements of the contract—not due to any statement made by the adversary, does not operate as a grounds for avoiding the contract. For this class of mistake, neither the law nor equity furnishes any relief.⁶⁸ It may seem difficult to draw a decided or strict line of demarkation between mistake in the inducement, and the mistake which

⁶⁵ Upton v. Tribelack 91 U. S., 45.

⁶⁶ Gregory v. Wendell, 40 Mich., 443.

⁶⁷ Thus, in *Boston Ice Company v. Potter*, 123 Mass., 29, the defendant, who had bought ice of the plaintiff, ceased to take more upon termination of the contract, on account of dissatisfaction, and contracted for ice with another company. Later on, plaintiff bought the other company's business and

delivered ice to the defendant without notifying the latter of the substitution until after the delivery and consumption of the ice. The court held that there was no privity of contract between plaintiff and defendant and therefore that the action to collect for the ice could not be maintained.

⁶⁸ *Moore v. Scott*. 47 Neb., 346.

will justify a repudiation of the contract. It may be safely said that the courts are somewhat divided on this point as applied to similar conditions of fact, many courts considering extreme cases of facts in the inducement, as material and essential elements of the agreement.⁶⁹

A party who is entitled to avoid a contract on the ground of mistake must rescind at law, or seek his relief in equity.

§103. **Undue Influence.**—(a) **Nature.**—Undue influence, as regards the formation of a contract, is defined as an unconscientious use of the power arising out of circumstances and conditions of the contracting parties which raises the presumption of fraud. Undue influence may consist in the use, by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him,⁷⁰ by taking advantage of another's weakness of mind;⁷¹ or in taking a grossly oppressive and unfair advantage of another's necessities or distress.⁷²

(b) **Effect and Remedy.**—When the relative position of the parties is such as to raise the presumption of undue influence, a contract so made cannot stand unless the person claiming the benefit of the contract can rebut the presumption of said influence by contrary evidence, proving the transaction to have been fair and reasonable.⁷³

The rules respecting the right to rescind contracts entered into under duress, or undue influence, follow the rules which apply to fraud, with the qualifications, however, that, unless it is clear that the freedom of the injured party has been restored; or that the will of the injured party is relieved from the dominant influence under which it has acted; or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information; an affirmance of the agreement, by such party, will not be allowed to bind him.

⁶⁹ Page on Contracts, §156.

⁷⁰ Brock v. Barnes 40 Barb. (N. Y.), 521.

⁷¹ Tracy v. Sackett 18 Ohio. St., 58.

⁷² Bigelow on Frauds, p. 259.

⁷³ Schofield v. Walker, 58 Mich., 96
Wise v. Foote, 81 Ky., 10.

CHAPTER XIII.

PROOF OF CONTRACTS

§104. In General.

105. Methods of Proof.

- (a) Sealed Instruments .
- (b) Parol Evidence.
- (c) To Prove Contract Invalid.
- (d) As to Contract Terms and Parties.
- (e) As to Custom.
- (f) To Show Mistake.

§104. **In General.**—The proof of a contract involves the circumstances and intentions under which it was made. These circumstances and intentions are questions of fact for the jury, or for the court when it sits as judge of the facts.

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§105. **Methods of Proof.**—Contracts under seal are proved by evidence of their sealing and delivery. Contracts by word of mouth, verbal contracts, or in writing, are proved by parol evidence or those written evidences produced in court which the respective parties offer to support their contentions. The rules applicable to oral contracts are governed by general laws of evidence and will not be here considered.

(a) **Sealed Instruments.**—Contracts under seal are said to prove themselves. By that is meant that once the fact of the sealing of a contract being established, and its delivery to the other party proven, no farther evidence as to the making of the contract is necessary. In other words, the fact of a seal on a contract legally and conclusively, of itself, proves the contract upon the fact of the sealing being shown. Contracts under seal were formerly attested by the signature of two or more witnesses to the execution of the contract. When these witnesses could not be produced at the trial, proof of their handwriting was sufficient. In most states attesting witnesses, except in particular cases, as in wills, are not now required.

(b) **Parol Evidence.**—Parol or oral evidence is admissible in proving a simple and unsealed written contract, (1) to show that the signature thereto is that of the person sought to be charged, or that the defendant made the contract; (2) to supplement the writing constituting part of the contract; or (3) to connect several separate writings which go to make up the whole contract. In ordinary contracts parol evidence must necessarily be admitted to prove the identity of the parties. In cases in which the offer was in writing, and the acceptance was by parol, proof of acts constituting acceptance must necessarily be by parol evidence. Such is the case where a written offer was made to buy goods with instructions to ship if the offer is accepted. The seller completes the contract by shipping the goods, and this fact may be proved by parol evidence.

(c) **Same.—To Prove a Contract Invalid.**—Incapacity, such as minority, insanity, etc., mistake, fraud, want of genuine consent, and the like, in the making of a written contract, may be shown by parol proof. In the case of a simple contract, where only the promise appears in writing, it may be shown by oral testimony that there was no consideration therefor. In the case of *Rhine v. Allen*,¹ the plaintiff executed a deed to certain mining land in favor of the defendant and others, in which the mutual consideration was expressed as paid. In reality, the defendant had not paid anything, and plaintiff brought action to collect the consideration for the conveyance, which the defendant had repudiated. The court allowed the plaintiff to show by parol evidence that the consideration from the defendant recited in the deed as paid, had not in fact been paid. The defendant, in contradiction of the plaintiff's contention, was allowed to show by oral testimony that there was a condition coupled with the consideration to the effect that he might work the mine a year, and if he chose to make an absolute purchase within that time, for the consideration as agreed upon, he might do so. The preponderance of evidence of this collateral fact sustained the defense.

(d) **Same.—As To Contract-Terms and Parties.**—Parol evidence is also admissible to explain the terms of a

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contract; and to identify the contracting parties. Explanation of the terms of a contract may amount merely to evidence of the identity of the parties thereto, as where two persons have the same name, or where an agent has contracted in his own name but on behalf of a principal whose name or whose existence he omitted to disclose.² But the names of the parties cannot be changed or contradicted by parol evidence, nor can a person show by parol testimony that he acted merely as agent for another when he contracted in his own name.³ Other matters such as a description of the subject matter; the extent of the liability intended; and the limitation of the meaning of certain words; may also be thus proved, when they are not definitely shown in the contract. The uncertainty and indefiniteness of the contract, to allow the admission of such evidence, must be sufficient to render the contract unintelligible or ambiguous without such oral proof.⁴

(e) **Same—As to Custom.**—Parol evidence of custom in a particular locality, or of a usage of trade, is admissible to explain written contracts. The custom may concern a mode of living, or pertain to agriculture, commerce, or any of the numerous subject-matters of contract. The theory of the admissibility of oral evidence of custom or usage, like the theory allowing the admission of parol evidence as explanation, is that the parties did not intend to put in writing the whole of the contract by which they were to be bound, but contracted with reference to what was generally understood by persons in their particular location or line of business.

A custom or usage to be admissible as proof must have been one that was established at the date of the contract. Furthermore it must be general, uniform, certain, continued, acquiesced in, consistent with the law, and reasonable.

(f) **Same—To Show Mistake.**—The admission of parol evidence to prove the intention of parties in cases where by mistake, the contract does not express the true intention.

² *Martin v. Smith*, 65 Miss., 1; *Wakefield v. Brown*, 38 Minn., 361.

³ *Dexter v. Ohlander*, 93 Ala., 441; *Brigham v. Herrick*, 173 Mass.,

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⁴ *Sanderson v. Piper*, 5 Bing (N. C.), 425.

necessitates the application of equitable remedies, which will be more fully discussed when we take up the subject of Equity.

We may say now that equity admits such evidence in many cases where courts of purely common-law jurisdiction would apply the strict rules of evidence, and thus fail to afford full relief. In all cases where a contract is alleged not to express the actual agreement, because of a mistake of the parties thereto, the mistake must have been mutual, and the evidence thereof must be clear and convincing. Or, in other cases, there must have been some fraud on the part of the party to the contract, other than the one seeking to reform it. In case of fraud in procuring the execution of a contract, the contract is void. The proper remedy in such cases is an action at law for damages; but, when the fraud consists in an unfair knowledge by one of the parties, after the execution of the contract, whereby he will profit by the other's mistake, equity will rectify the mistake, even though it is not mutual. ⁵

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QUIZZER.

ACTIONS AND DEFENCES.

- 1-§96. When does a right of action on a contract accrue—state fully?
- 2-§97. What can you say as to a party having a choice of remedies in certain cases arising from contracts?
- 3- Can a party under such circumstances pursue two actions at one time upon the same cause of action?
- 4-§98. Upon what must the defence to an action on contract be based? Name several items of possible defence to such actions.
- 5-§99 Define duress and name its kinds.
- 6-(a) What is the effect upon a contract, or duress exercised upon its execution?
- 7- Name the two kinds of duress of the person.

- 8-(b) Define duress of person.
- 9- From what can duress arise?
- 10- Is one legally under duress where his imprisonment is legal but the process was maliciously issued?
- 11- Upon whom must the act of duress be imposed in order for it to be available in defence of a contract?
- 12- Who must perform the act of duress in order for it to be so available?
- 13- Is a contract entered into in order to relieve a third person from duress voidable on that ground?
- 14-(c) Define duress of goods.
- 15- When does such a duress exist?
- 16- Is this form of duress ground for avoiding a contract?
- 17- What is the effect upon a contract given to recover goods detained without right?
- 18- Can money paid for the release of goods from duress be recovered?
- 19- What must the party pleading duress show, to make such defence effective?
- 20-§100 Define fraud.
- 21-(a) What distinction in the definition of fraud did the common law and the equity courts make.
- 22-(b) How does fraud differ from mistake?
- 23- How does fraud differ from misrepresentation?
- 24- Is the non-disclosure of material facts fraud?
- 25- Is mere silence of fact, a basis for invalidating a contract?
- 26-(c) Name the eight essential features of fraud.
- 27- How does fraud, in the actual making of a contract, affect it?
- 28- Can a void contract be rescinded—and why?
- 29- Name illustrations of common forms of fraud in contracts which render same void.
- 30-(d) Is the form in which a false representation is made material as affecting the validity of a contract?

- 31- In what may a false representation consist—state fully?
- 32- Is there any legal difference between fraud in fact and fraud in law?
- 33- Is disclosure of facts incumbent in contracts of sale?
- 34- Do oral misrepresentations in contracts, coming under the statute of frauds constitute grounds for invalidating the contract?
- 35-(e) Will mere expressions of opinion, belief, or expectation, invalidate a contract?
- 36- Will representations of an intention amount to a fraud?
- 37- Give several illustrations of the application of the principles covered by the last two questions.
- 38-(f) What is essential in false representations, to enable one to rescind a contract or maintain an action for deceit in procuring same?
- 39- Can one who did not know that the statements made were false or one who disbelieves such statements as made, take advantage of same?
- 40- Is it necessary that the false representations be the sole motive in entering into a contract to avoid same for that cause?
- 41- What duty of investigation does the law impose upon one entering into contracts?
- 42-(g) Is it essential that there be an intention to deceive in making a false representation?
- 43- What is sufficient in making false representations, to work an invalidation of a contract?
- 44-(h) Will false representations made to a third party give grounds for invalidating a contract—if so, when?
- 45- Can a statement to the general public amount to a fraud on any individual?
- 46-(i) Does legal fraud exist where no injury results from fraudulent representations?
- 47- Is it a legal fraud to make false representations to induce one to perform a legal duty?

- 48- When will false representations, followed by no actual damage, give basis for rescinding a contract?
- 49-(j) May a person injured by fraud, apart from contract, maintain an action for damages therefor—if so, under what form of action?
- 50- Will courts of equity afford relief for misrepresentation—if so, how?
- 51- What choice of action has an injured party upon discovery of fraud?
- 52- Upon what is the right to recover damages dependent as a general rule?
- 53- How is the right to avoid a contract limited—state fully?
- 54- Are contracts secured through misrepresentations void or voidable?
- 55-§101 Define misrepresentation, and distinguish it
(a) from fraud and mistake?
- 56- How is misrepresentation confused with, and to be distinguished from, “condition” or “warranty” in a contract?
- 57-(b) What is essential to constitute legal misrepresentation?
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- 61- Is a misrepresentation, made after the transaction is entered into, legally a false statement?
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- 63-(e) What is finally essential to make a mis-statement legally operative?
- 64- How do misrepresentations as to an immaterial fact effect a contract?
- 65-(f) What is essential in order to render misrepresentations an effective ground for avoiding a contract?

- 66- What class of contracts—and for what reason—are an exception to the general rule placing obligations not to misrepresent concerning same?
- 67-(h) Can one, in equity, rescind a contract which he made by misrepresentation of the other party?
- 68- What innocent misrepresentations are held sufficient to enable the party misled thereby to avoid the contract?
- 69-§102 What kind of mistake does the law take cognizance of?
- (a)
- 70- How will courts correct mistake of intention, and how mistakes of expression, in a contract?
- 71- How does legal mistake affect a contract?
- 72- What is essential in mistakes for it to have this effect?
- 73- Define mistake.
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- 75-(b) When will mistake as to the subject matter of a contract avoid same—illustrate?
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- 81- What is the effect on a contract where the mistake is the direct result of fraud?
- 82- What legal rights has a mistaken party in an executory contract?
- 83- Does mistake as to collateral facts furnish a basis for rescinding a contract?
- 84- What choice of remedies must one make who is entitled to avoid a contract on the ground of mistake?
- 85-§103 Define undue influence.
- 86-(a) Of what may undue influence consist—state fully?

CHAPTER XIII.

PROOF OF CONTRACTS

§104. In General.

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- 82- What legal rights has a mistaken party in an executory contract?
- 83- Does mistake as to collateral facts furnish a basis for rescinding a contract?
- 84- What choice of remedies must one make who is entitled to avoid a contract on the ground of mistake?
- 85-§103 Define undue influence.
- 86-(a) Of what may undue influence consist—state fully?

- 87-(b) What defence to a claim of undue influence has a party against whom such influence is charged?
- 88- How far do the rules applicable to fraud and duress apply to cases involving undue influence?

PROOF OF CONTRACTS.

- 1-§104. What does the proof of a contract involve?
- 2- Who decides the questions of fact thus arising?
- 3- Under what subject will the general rules as to proof be found?
- 4-§105. How are contracts under seal proven?
- 5-(a) How are other contracts proven?
- 6- What is meant when one says that sealed contracts prove themselves?
- 7- What can you say as to attesting witnesses upon sealed contracts; how proof is made in their absence; and present requirements as to such witnesses?
- 8-(b) When is oral, or parol evidence admissible to prove a contract?
- 9- What contracts cannot be established by parol testimony?
- 10- Name contracts which require parol testimony to prove same.
- 11-(c) What circumstances, showing a contract to be invalid can be proven by parol?
- 12- In what cases can lack of consideration be shown by parol?
- 13- State the facts in the case of *Rhine v. Allen*.
- 14-(d) What facts, supplemental to the contract, can be proven by parol?
- 15- What may be so proven in "explanation" of the contract?
- 16- What may not be so proven?
- 17- What degree of "indefiniteness" is necessary to sanction oral proof of a contract in writing?
- 18- What can you say as to admissibility of oral proof, of a custom or usage?
- 19-(e) Upon what theory is such evidence allowed?

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- 20- What is essential as to the custom sought to be so proven?
- 21-(f) What is the nature of the remedy in case of mistake in drawing a contract?
- 22- What must be the nature of the mistake to warrant verbal proof thereof?
- 23- State fully the factor of fraud in the procuring of a contract to warrant proof in an action to correct same.
- 24- When will equity rectify a mistake, even though it be not mutual?

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Frank C. Smith, LL. B., Dean.

LESSONS 10 to 15.—

TITLE IV.—NEGOTIABLE INSTRUMENTS.

By Charles Coan, LL., 'B.

LESSON 10.—

CHAPTER I.

GENERAL CHARACTERISTICS AND KINDS.

- §1. Importance and Origin.
2. The "Law Merchant."
3. What is "Negotiability?"
4. Essentials of Negotiability.
5. Forms of Negotiable Instruments.
6. Certain Instruments Distinguished.
 - (a) In General.
 - (b) Parties.
7. Liability of Parties.
8. Definitions.
9. Consideration.
10. Law Governing Commercial Paper.
11. How Made.
12. Promissory Notes.
13. Bills of Exchange.
14. Checks.
15. Bank Notes.
16. Bonds and Stocks.
17. Letters of Credit.
18. Certificates of Deposit.
19. Bills of Lading.

§1. **Importance and Origin.**—Negotiable instruments including, as the term does, bills of exchange, promissory notes, checks, corporate, governmental, and municipal bonds, bank drafts, bank notes, letters of credit, certificates of deposit, and other forms of financial and commercial paper, comprises one of the largest branches of the law of contracts. These varying instruments have several attributes in common and yet each possesses distinctive legal qualities distinguishing it from the others.

The law relating to commercial paper presents the widest divergence from the general principles governing

contracts of any of the departments of contracts. This arises from the fact that the rules applicable to bills and notes—those instruments most commonly in use in commercial life—did not have their origin in the English common law, but were a part of the Law Merchant of Lombardy and other commercial cities of Italy, and were therefrom adopted by the early traders and bankers of England, and ultimately grafted on to the English Common Law.

§2. **“Law Merchant”**—This body of law—known in its original language as the “*lex mercatoria*,” and now frequently so called—was a system of law governing merchants and mercantile transactions during the mediaeval era and afterwards, throughout Southern and Western Europe. It harmonized the mercantile law of the different commercial cities and nations, and was of more universal authority than the common law of England.¹ As already stated, it was adopted into the English law, and is a part of the common law of this country. Its rules are the basis, not only of our general law affecting negotiable instruments, but the uniform Negotiable Instruments Law adopted by many of the states—and certain to be adopted by all of them in due time,—and the like present-day law of England and her colonies, may be said to be the modern exponent of the Law Merchant.²

§3. **What Is Negotiability.**—Those forms of negotiable instruments coming under the classification of commercial paper, and including principally—and, perhaps, only—bills of exchange, promissory notes, checks and such other forms as fulfill the same special purposes as these, are the representatives of money—itself a representative of value—and they therefore partake of many of the attributes of money and possess privileges not shared by any other kind of personal property. This money-quality, this representative of money value, which enables such paper to pass from hand to hand until its maturity as money, and which endows it

¹ Randolph on Commercial Paper, §1.

² A very important and interesting discussion of the law merchant is contained in an appendix to Vol. 1 of Cranch's United States supreme court reports. See also Supp. to U. S. Rev. Stat. c. 137, §1, where,

in defining the jurisdiction of the United States circuit and district courts congress specifically recognizes this system of law by giving such courts jurisdiction over cases arising thereunder.

with these special privileges, arises from its quality of "negotiability."

This distinguishing characteristic is that arising from the form of the paper by which the legal title thereto, and to the whole amount of money expressed upon its face, may be transferred from one person to another by indorsement and delivery of the paper by its holder, or, on paper of a certain form, by delivery only.³ Negotiability, as applied to commercial paper means not only that the instrument may be transferred, and that the transferee may bring an action on it in his own name, but also that such transfer shall be subject to no equities or rights between prior parties, and that out of the transfers of the paper shall grow an orderly commercial relation and liability between the holder and all persons whose names are on the paper.⁴

§4. **Essentials of Negotiability.**—To render an instrument negotiable it must, in its form and substance, contain factors, the presence of all of which makes the instrument legally negotiable, and the absence of any one of which may render it non-negotiable, or at best, only quasi-negotiable.

These essential factors are: (1) a date; (2) a promise to pay money; (3) certainty of the payee; (4) definiteness of amount to be paid; (5) certainty of time of payment, i. e. the date of the maturity of the instrument; (6) definiteness of place of payment; and, (7) certainty as to the payor or promisor, i. e. the party who made and issued the instrument.

§5. **Forms of Negotiable Instruments.**—The usual forms of negotiable paper are bills of exchange—usually called bills or drafts—promissory notes, and checks. The essentials above mentioned must all be complied with in order for these instruments to be truly negotiable, and it is well to dwell upon this fact with emphasis so that it may be clearly fixed in the mind.

To illustrate: a negotiable instrument must be for the payment of money and only money. If it is payable in any kind of property or of work or services, it is not negotiable. Accordingly, a note promising to pay one hundred dollars in "oil stock," or in "cattle," or in "work and labor" is

³ See 1 Daniel, Neg. Insts. 1.

⁴ Bouvier's Law Dict.

unnegotiable. Likewise a draft, or a check so payable.

The instrument must contain no conditions. The promise, or the request, or the order, as the case may be, must be absolute, as has been said. The full amount called for must be payable at all hazards, and not dependent upon any contingency. Thus, an instrument calling for the payment of a certain sum of money "out of the sale of my crops," is not negotiable, although it is, otherwise, a good evidence of indebtedness. These, and the other requisites of negotiability will be farther treated in the discussion of the several kinds of negotiable paper.

§6. Certain Instruments Distinguished. (a) In General.—There are some essential differences between drafts, checks and notes, which, while they have much in common, it is well to get a clear understanding of before taking them up separately.

In a bill of exchange, or draft, one person requests another to pay still another a certain sum of money. Three parties are here involved. The first—the one who issues the paper—is called the drawer; the second—the one to whom the paper is addressed—is called the drawee; and the third—the one to whom the paper is given, or made payable—is called the payee.

A check is a bill of exchange, but it has some features which give it a special character necessary to carefully note. A bill of ordinary character may be drawn on any person or corporation; but a check, in order to be such, must—and can—be drawn only upon a bank or banker. Furthermore, a bill, like a promissory note, may be payable on time, that is, after a stated period such as "ten days after sight" or "ten days after date," as well as "at sight," or "on demand," whereas a check must always be drawn payable on demand. If an instrument although intended as a check does not comply with these two requirements, it is not a check, but a draft. Thus we see that all checks are drafts, but all drafts are not checks.

Important differences between these instruments, too, are the facts that a check—and, indeed, a promissory note—need not be protested in the event of non-payment, whereas protest is required of bills of exchange; and, that delay in presenting a bill to the drawee will absolutely

exonerate the drawer, but delay in presenting a check will not have this effect unless the drawer has been injured thereby.

(b) **Parties.**—On promissory notes only two parties are primarily involved, namely, the maker or promisor, and the payee or promisee.

Besides the parties to the instruments under consideration already defined, there may be three others, legally speaking, i. e. the indorser, the indorsee, and the holder. If the payee or other holder of such paper made payable to his order wishes to transfer it to another, he must do so by writing his name across the back of it,—indorsing it in other words—and by delivery of it to the other party, who is, in legal contemplation, the purchaser of the paper. When this is done the party so transferring is known as the indorser, the party so receiving is the indorsee, and while he remains the owner of the paper he is its holder. Thus the holder, upon such transfer by him of the paper becomes the indorser, and his indorsee or purchaser, becomes also the holder.

§7. **Liability of Parties.**—The legal liability of the various parties to these instruments is different each from the other, and it is important that an accurate understanding thereof be had. Some are responsible primarily, others, secondarily.

On a bill of exchange as it is originally drawn, the only person then liable, is the drawer. To make the drawee responsible he must agree to pay it, and he makes and signifies this agreement by accepting the draft. His doing so is termed an “acceptance” and is usually evidenced by his writing or stamping the word “accepted” across the face of the instrument and signing his name thereunder. Upon doing this he becomes the “acceptor” and the one then liable principally on the paper.

If acceptance of a bill is refused the holder may immediately sue the drawer. If acceptance is given, the holder must wait until the instrument matures, at which time he must present it to the acceptor for payment. If it is not then paid he must protest it, and give due notice of such non-payment to the drawer, in order to legally hold him.

By this it is seen that the drawer of a bill is only secondarily liable after the drawee has accepted it, and that he will be bound to pay only if the acceptor—the party primarily liable—fails to do so, and if protest for such non-payment be made, and notice of the protest be duly given him.

In the case of a promissory note the maker is primarily responsible throughout.

The liability of an indorser is secondary. By writing his name on the back of the bill he says in effect: "If the drawee does not accept, or if the drawee having accepted does not pay, I will, provided that the instrument has been presented to him for acceptance, or payment demanded, and notice of non-acceptance or non-payment has been given to me."

§8. **Definitions.**—Summarizing what has already been said in drawing the distinctions between certain kinds of instruments and showing the liability thereon of the several parties thereto, these definitions will be found helpful:—

A promissory note is an unconditional promise in writing for the payment of a sum of money, by one person to another, on demand, or at a fixed determinable future date, or to the order of a specified person, or to bearer.⁵

A bill of exchange is an unconditional request or order in writing, by one person addressed to another person, directing such person to pay, at a time therein stated, the sum of money therein named, to a third person, also named therein.⁶

A check is a written order on a bank or banker, drawn against a deposit of funds, directing the payment of the amount named therein to a person therein named, or to his order, or to bearer, immediately on its presentation.⁷

The person giving a promissory note is called the maker. If it is drawn in favor of a specific individual named in the body of the paper, and not merely to "bearer" or to "cash," he is known as the payee. Notes are frequently drawn to the maker's own order; they then take effect only on indorsement and delivery by him.

A person drawing a bill of exchange is called the

⁵ Hall v. Farmer, 5 Denio, 486.

⁷ Bowen v. Newell, 5 Sanf. 328.

⁶ Bouvier's Law Dict.

drawer; the person on whom it is drawn, the drawee; and the one in whose favor it is drawn, the payee. When accepted by the drawee, he becomes the acceptor.

Indorsement is the transfer of an instrument written on the paper, and usually consists of writing the name across the back of the instrument.⁸ The person so transferring is called the indorser; the party to whom the paper is then delivered is the indorsee and the holder.

Dishonor of commercial paper is the neglect or refusal of the person primarily liable thereon, to liquidate the same according to its terms at the time of its maturity. A bill of exchange is also termed dishonored when the person on whom it is drawn refuses or declines to accept same on its presentation to him for that purpose.

The time when the paper is due and payable is spoken of as its maturity. Formerly it was the practice to allow "days of grace," usually three in number, after the expiration of the time limited for the payment of a bill or note, the paper being then fully payable on the last day of grace. But this indulgence, unnecessary now in these days of rapid and sure communication and transmission, has been done away with by statute in most all of the states.

Maturity therefore may now be said to be the day indicated in an instrument itself as its due date. If payable "on demand," or "at sight," it matures when presented. Some of the states fix a time by statute determining the time of the maturity of such instruments as are payable "on demand." Where this is not so provided for, however, presentation of the paper for payment fixes its maturity.

§9. **Consideration.**—Commercial paper must be based upon a consideration either actual or presumed. The consideration is expressed by the term "value received" in an instrument when it is used; otherwise it is implied.

There is sometimes issued what is called "accommodation paper" where one, without actual consideration, and wholly to accommodate another, gives his paper, or his indorsement, for the purpose of enabling the latter to procure credit. Between the parties themselves there is no liability on paper of this character; but when it passes into the hands of a bona fide holder, who gives value for it and

⁸ Com. v. Spilman, 124 Miss., 329.

without notice that it is merely an accommodation paper, he is entitled at maturity to recover from the accommodator if necessary, the amount named therein, notwithstanding the fact that there was no actual consideration passed between the original parties at the inception of the paper.¹⁰

§10. **Law Governing Commercial Paper.**—It is frequently the case that commercial paper in the due course of modern business life circulates from one state to another, and at maturity is far from the place where it was issued. In such event it becomes important to determine what law applies to it. It may be said in general that the law of the place where an instrument is delivered is that which controls it. This is what is termed the law of place. There may be instances where it is rather difficult to determine just what law applies, but these are now of rare occurrence, and the rule here laid down is a safe one to follow in the large majority of cases.¹¹

The validity of paper itself is fixed by the law of the place where it is made. If valid there, it can be enforced anywhere, except in those cases where it appears on the face of the instrument that it is void on the ground of public policy. The nature, obligation and interpretation of such instruments are governed by the law of the place of their payment.

§11. **How Made.**—It will be observed that in the definition of each form of commercial paper there is implied an instrument in writing. This does not require that it must necessarily be written in ink.¹² It may be in pencil or any other substance capable of making legible writing. This of course includes printing, at least so far as the body of the instrument is concerned, though the signature must be actually written. The use of a mechanical device of any kind in affixing a signature would hardly answer the requirements.¹³

The signature of the maker is usually placed at the lower right hand corner of the instrument, and as has been said before the names of the indorsers on the back.

¹⁰ *Dunn v. Weston*, 71 Me., 273.

¹¹ *Commercial Bank v. Simpson*, 90 N. C., 471.

¹² *Commonwealth v. Ray*, 3 Gray, 447.

¹³ *Reg. v. Harper*, 15 Am. Law Rev., 553.

The time of delivery is as a rule shown by the date of an instrument, and when there is a date it is presumed that the paper was delivered at that time.

No particular form of words are necessary to constitute a negotiable instrument, except that they must cover the essential features of such instruments heretofore pointed out. Where no time is expressed as to when the instrument is to become due it is held to be payable on demand. The words "order" or "bearer," or their equivalent, placed in connection with the name of the payee, are necessary to show negotiability. If made payable to a named person only without some such word, the paper is not negotiable. When made payable to bearer, such paper may be transferred by delivery without the necessity of indorsement by the holder.

§12. **Promissory Notes.**—As has been stated the usual form of a note after giving the place where made, and the date, either provides "on demand," or a specific time "after date," a promise to pay "to bearer," or "to the order of," a specific person therein named, a sum of money at a fixed or determinable future date, and usually has a place of payment named therein. It becomes effective on delivery. At the time of payment when according to the terms of the instrument it is due, it must be presented for payment to the maker, and if a place of payment is named therein, the presentation and demand must be made at that place. If no place of payment is named in the paper it should be presented at the place of the residence or at the usual place of business of the maker. If no such place can with reasonable diligence be found, it is the general rule that then presentation for payment is not required in order to charge the maker.

Where a note is signed by two or more makers it may be either joint or joint and several. If it reads: "We promise," it is joint only, but if signed by two or more persons and begins "I promise," or "We jointly and severally promise," it is both joint and several. If signed by a firm or a corporation it is both joint and several. This means that the parties are liable jointly and severally, and in the case of a firm or corporation it makes no difference whether the paper reads, "I," or "We" promise.

§13. **Bills of Exchange.**—Bills of exchange are of two kinds, domestic or inland, and foreign. An inland or domestic bill of exchange is one drawn and payable within the one state or country.

A foreign bill of exchange is one drawn in one state or country, and payable in another. A bill drawn in one of our states and payable in another is therefore, in the legal sense, a foreign bill.

Inland or domestic bills of exchange are usually drawn in but one part, and the same is the practice where the bill is drawn in one state and payable in another; but where it is payable in a foreign country they are usually drawn in triplicate for greater certainty of safe carriage and transmission, the duplicate advices to the drawee being mailed under separate covers. Forms of these and also of other commercial instruments, will be given in the lessons on Forms.

§14. **Checks.**—One of the most common forms of negotiable instruments is the ordinary bank check which has already been defined. We have seen that it is necessarily drawn on a bank or banker; that it presupposes a fund against which it is drawn, and that it is payable instantly on demand. As stated it in some respects resembles an inland bill of exchange;¹⁴ but it differs in the essential particular that it presupposes the existence of a fund on hand at the bank at which it is to be paid;¹⁵ that it must be drawn on a bank or banker; and that it is payable on demand. It passes by indorsement or delivery in the same manner as do other like negotiable instruments. It has been held that where a check is post-dated, or appears to be payable on a future day, it is really a draft or bill of exchange and not a check.¹⁶

A check should always bear a date; and it has been said that where a check contains no date it is never payable.¹⁷ Another standard writer says that this question as to a check having the date blank has never been adjudicated.¹⁸ While the Negotiable Instruments Law, which has

¹⁴ Conger v. Armstrong, 3 Johns. Cas. (N. Y.), 5.

¹⁶ Minturn v. Fisher, 4 Cal., 36.

¹⁷ Morse on Banking, 233.

¹⁵ Espy v. Bank of Cincinnati, 18 Wall (U. S.), 620.

¹⁸ Daniel Neg. Insts., p. 601.

been adopted in many of our states contains the provision that "Where an instrument is not dated it will be considered to be dated as of the time it was issued," it is believed that a bank would be warranted in refusing to pay an undated check.

The question of when a check should be presented for payment is of great importance and will be fully dwelt upon later. At this point it is sufficient to say that it must be done with diligence and without unnecessary delay.

The question whether the tender of a check instead of money in payment of a debt, is good in law, and if refused works a cancellation of the debt; and also as to what is a proper tender, will be considered later. As a general rule, we may say that where the parties have previously in the regular course of their business transactions used checks, such a tender would be held to be good; but if in prior transactions cash had always been used, it would not be. Of course if a check is paid when presented a debt thereby recognized is discharged.

§15. **Bank Notes.**—Bank notes while not generally looked upon as being negotiable instruments are such in fact. They are the promissory notes of the bank or banker issuing them; are payable on demand, and are intended to and generally do circulate as money. In the United States while legally state banks may issue notes, yet it is not now done because of the burden of a heavy federal tax thereon. Accordingly, at the present time the national bank system is the exclusive source of bank notes in this country. The issue is regulated by act of congress and can only be done with the approval of the United States treasury department. The banks are required to deposit United States bonds with the department to secure their issues.

It may be remarked in passing that the "scrip" issued at times during great business depression, are really bank notes, for they are the promises of the banks to pay money. Whether these issues are really legal has always been a grave question which has not yet been judicially determined. Bank notes must not be confounded with United States treasury notes issued by the United States government which are of course negotiable instruments of like character. These and bank notes are not securities for

debt, but, to all practical intents and purposes are money and are intended to serve the practical uses of money.

§16. **Bonds and Stocks.**—The bonds of corporations whether municipal or private are also negotiable instruments and are frequently so made specifically, in form being drawn “to bearer,” or “to the order of,” some named payee. They are clearly so as to their legal quality of transfer by delivery or by indorsement clear of all defenses. The interest on bonds is usually witnessed by coupons—that is to say, by small notes, maturing at the several interest periods, and covering the amount of interest then due—attached to the bond itself. These coupons may be severed from the bond and transferred without it. Daniel refers to them as “Coupon bonds.”¹⁹

Corporate bonds are as a rule signed by the president of the corporation and countersigned by such other officer as the corporate laws may provide, usually the secretary or treasurer. While it is usual to also attach the seal of the corporation, it is not at all necessary to do so in order to legalize them. While bonds are usually sealed instruments, there are exceptions. Bonds may be issued by either private or public corporations, and when issued by a public corporation are termed municipal, state or government bonds as the case may be. The ordinary corporate stock certificate may also be included in this general class. They may be said to be governed by the same legal rules and principles as corporate bonds.

§17. **Letters of Credit.**—Letters of credit in a manner resemble bills of exchange. In fact, however, they differ materially. A letter of credit is used when a person intending to travel desires to have on hand ready funds at the point where he desires to make use of them. The chief advantage of the letter of credit over the certified check or the cashier’s check, is that the holder may at any time draw thereon only the amount which he desires. They, like bank notes, are not securities for debt; but rather letters of request whereby one person—usually a bank or banker—requests another person—usually also a bank or banker—to advance money and give credit to a third person; and

¹⁹ Daniel Neg. Insts., p. 490.

wherein the person issuing the letter undertakes to repay such sum or sums as may be so advanced.

Letters of credit may be addressed to a particular person, and if so they are known as "special" letters. Or they may be addressed to no person in particular, simply to "any bank or banker" for instance, and are then called "general" letters of credit. Letters of credit are not necessarily issued for a certain amount, but signify the largest amount for which they are issued and will be honored or redeemed by the drawer. As they are drawn upon by the holder or payee the banker making the payment indorses the amount paid by him to the holder, on the back thereof or on some other prepared space on the letter. This is done from time to time as funds are called for up to the total face of the instrument.

§18. **Certificates of Deposit.**—Certificates of deposit are receipts for money deposited, with a promise to hold, or pay it, as may be agreed between the parties and as stated in the certificate. They are usually issued by banking houses and intended more as funds left for safe keeping than to be drawn against. They represent an indebtedness of the issuing party, to be paid on surrender of the certificate. They usually bear interest and may be transferred by indorsement unless restricted thereon.

§19. **Bills of Lading.**—Bills of lading which are really quasi-negotiable instruments, possess certain qualities which render them in some respects closely akin to the nature of the instruments we have been discussing. They may be defined as the written acknowledgment by the representative of any common carrier, that he has received the goods therein described, for the voyage or journey therein stated, to be carried upon the terms, and delivered to the persons, therein specified. It is at once a receipt for the goods described therein, which renders the carrier responsible as their custodian, and an express written contract for their transportation and delivery.²⁰

The negotiable nature of bills of lading arises from the fact that they are frequently used to transfer the title to goods purchased, before their delivery to the buyer, and

²⁰ Cavallaro v. Texas Rwy. Co., 110 Cal., 348.

while they are still in the possession of the party issuing the bill. They may be transferred by indorsement and when indorsed pass the title to the goods—and the goods themselves—the same as by an actual delivery and transfer thereof.

A bill of lading should state the quantity of merchandise covered thereby; such marks of identification as may be thereon; the names of the shipper and of the consignee; of the master of the ship or other common carrier transporting them; the places of the departure and of the discharge of the shipment; and the cost of the freightage.

QUIZZER.

GENERAL CHARACTERISTICS AND KINDS.

- 1-§1. What does the term “negotiable instruments” include?
- 2- What is the relative importance of such instruments in the law of contracts?
- 3- Is the law relating to such instruments based upon the general principles of the law of contracts?
- 4- If not, upon what is any divergence based?
- 5-§2. Define the “Law Merchant.”
- 6- What laws did this system harmonize?
- 7- How did it become a part of the English Common Law?
- 8- Of what present-day law is the Law Merchant the basis?
- 9-§3. Of what is commercial paper the representative?
- 10- What quality attaching to commercial paper endows it with special privileges?
- 11- What are the special privileges attaching to commercial paper?
- 12- From what does the distinguishing characteristics of commercial paper arise?
- 13- What is negotiability?
- 14-§4. State the essentials of negotiability.
- 15-§5. What are the usual forms of negotiable paper?
- 16- What is requisite to endow paper with the quality negotiability?

- 17- In what only must a negotiable instrument be payable?
- 18- Can an instrument payable in work or property, be negotiable? Illustrate.
- 19- Can an instrument containing conditions be negotiable?
- 20- What quality must the promise or order of a paper possess to make it negotiable? Illustrate.
- 21-§6. Describe the form and substance of a bill of exchange.
- 22-(a) How many parties are involved in a bill of exchange? Describe the relation of each to the paper, and state what he is called.
- 23- How does a check differ from a bill of exchange?
- 24- Upon whom may a bill be drawn,—and upon whom must a check be drawn?
- 25- Are all checks drafts,—and are all drafts checks?
- 26- What is the difference between a bill or a note, and a check, as to the time of payment thereof?
- 27- Distinguish between the essentials of a bill and of a check.
- 28-(b) How many parties are there to a promissory note and what are they called?
- 39- What is the common technical term applied to the paper?
- 30- Define an indorser.
- 31- Define an indorsee.
- 32- Define a holder.
- 33- Describe how these relations succeed each other.
- 34- Define indorsement.
- 35-§7. What can you say as to the liability of the various parties to commercial paper.
- 36- Name the parties liable on a bill of exchange and state how such liability is created.
- 37- How does one become liable as an acceptor on such paper?
- 38- Who is primarily and who secondarily liable on bills of exchange?
- 39- What is the common technical term applied to the “acceptance” of checks?
- 40- Who is principally liable on certified or accepted checks?

- 41- What right has a holder of a bill the acceptance of which is refused?
- 42- What must a holder of a bill do if it is accepted?
- 43- What must a holder do if a bill is not paid at maturity—and for what reason?
- 44- What is the liability of the drawer of a bill?
- 45- Who is primarily liable on a promissory note?
- 46- What is the liability of an indorser,—and what is the legal effect of his indorsement?
- 47-§8. What is a promissory note?
- 48- Define a bill of exchange.
- 49- Define a check.
- 50- What do we term the person who makes a note?
- 51- The one in whose favor a note is drawn is called by what term?
- 52- When does a note become effective?
- 53- Where would you look to find whether there were any indorsements?
- 54- Name the parties to a bill of exchange.
- 55- State what relation they each bear to the bill.
- 56- Define what is meant by dishonor of commercial paper.
- 57- What is meant by the term maturity?
- 58- What are days of grace, and are they now generally in use?
- 59- When is a demand note due?
- 60- Is there any exception to this rule—if so what is it?
- 61-§9 What is the rule as to consideration, as affecting commercial paper?
- 62- How is consideration shown in an instrument?
- 63- What is accommodation paper?
- 64- What is the liability on accommodation paper when in the hands of innocent holders?
- 65- Is there any different rule as to the immediate parties—if so, what is it?
- 66-§10. What do you understand the term “law of place” to mean?
- 67- What law applies to the validity of commercial paper?
- 68-§11. Is it necessary that commercial paper be in writing.

- 69- What is covered by the term writing.
- 70- How should the signature be affixed?
- 71- Where on the paper would you look to find the name of the maker?
- 72- How would you fix the time of delivery of an instrument?
- 73- What word or words are necessary to show negotiability?
- 74- Is paper made payable to a certain named person, only, negotiable?
- 75- Must a note made to bearer have an indorsement in order to transfer it?
- 76-§12 If no place of payment is stated in a note where should it be presented?
- 77- When is a note a joint note, and when several?
- 78- How does this rule affect the paper of a firm or corporation?
- 79-§13. How many kinds of bills of exchange are there?
- 80- What is the difference between a domestic and a foreign bill of exchange?
- 81- In what forms are domestic, and what form foreign bills usually drawn?
- 82-§14. In what essential particular does a check differ from a bill of exchange?
- 83- What is the legal effect of a post-dated check?
- 84- Would a bank be warranted in refusing payment of an undated check?
- 85- What is the rule as to presentation of a check?
- 86- Does a payment by check ever cancel a debt?
- 87-§15. Are bank notes negotiable instruments?
- 88- What is the difference between a bank note and a treasury note?
- 89- What can you say concerning the use and the legality of bank "scrip"?
- 90-§16. Are corporation bonds negotiable?
- 91- Is the corporate seal necessary to make the bond legal?
- 92- What is the purpose of the coupons attached to a bond?
- 93- Are the coupons negotiable?
- 94- What is the difference between state and municipal bonds and those of a private concern?

- 95- What can you say as to the nature of corporate stock? State fully.
- 96-§17. What is the purpose of letters of credit, and what other instrument do they resemble?
- 97- Define them.
- 98- Name the different kinds of letters of credit.
- 99- What is the difference between them?
- 100-§18. What are certificates of deposit?
- 101- When are they usually issued, and state their characteristics?
- 102-§19. How would you define a bill of lading?
- 103- Are they ever spoken of as negotiable instruments?
- 104- From what does the negotiable value of bills of lading arise?
- 105- What are they usually termed?
- 106- Can a bill of lading be transferred and if so, how?
- 107- What should a bill of lading contain? State fully.

LESSON 11.—

CHAPTER II.

CONSIDERATION.

§20. Necessity of Consideration.

21. Good Consideration.

22. Void Consideration.

23. Good and Valuable Consideration Distinguished.

§20. **Necessity of Consideration.**—Commercial paper requires a legal consideration to support it of the same character as is necessary with all other kinds of contracts. This necessity applies between the parties to the instrument at its inception as well as to those who become connected with it later on by indorsements. Whether one be maker, guarantor, surety, acceptor, indorser, or indorsee, there must be a sufficient consideration to support the several contracts thereby entered into, or the rights of the respective parties cannot be legally enforced.¹

Each separate liability requires a separate consideration, so that the consideration for the making of an instrument will not support an indorsement after its delivery.² What consideration is necessary is determined by the law of the place where the paper is made.³ It is not absolutely required that in order to be valid a consideration must be adequate in value to the face of the instrument. Accordingly, paper purchased for an amount below its face value does not invalidate the transaction.⁴ Unless therefore the good faith of a transaction is clearly impeached, inadequacy of consideration is immaterial.⁵

§21. **Good Consideration.**—Money loaned or advanced, goods sold and delivered, or a money value in any form, is always a good consideration. So too is an advance or loan to a third person made at the request of the maker of an instrument. A bill or note may be given in contemplation of a liability incurred at the time, but payable in the future, and if given as security for a debt, the consideration is good also. And a note or bill given by one to discharge or extinguish the debt of another,⁶ is valid, the considera-

¹ See Ante, §9.

² Williams v. Williams, 67 Mo., 661.

³ Evans v. Anderson, 78 Ill., 558.

⁴ Tod v. Wick, 36 Ohio St., 392.

⁵ Kitchen v. Loudonback, 48 Ohio St., 177.

⁶ Stack v. Weatherwax, 52 Hun. (N. Y.), 615.

tion being sufficient if the original debtor is discharged from liability.⁷

Exchange of commercial paper of any description is a good consideration the one for the other, and they need not be for the same amount. Each instrument is an independent obligation in such an exchange, not conditioned on the payment of the other unless such condition be expressed in the paper.⁸ As between the original parties—the paper not having been transferred to an innocent holder—non-payment of one obligation may be available by the issuer of the other as a set-off on the claim of payment of such other instrument.

Services may be a valuable consideration for commercial paper if given in any character that makes the service a valuable and legal one. Services rendered or contracted to be rendered in aid of an illegal end, or in matters that are against public policy, such as acting as lobbyist to procure legislation, are not a valid consideration to support paper given therefor.⁹ An agreement for services to be rendered in the future is a good consideration; and a promise to refrain from injurious remarks, promises of marriage, and others of a similar character, though not based upon a pecuniary character, have been held to be a good consideration.

Where a bill or note is given for a subscription to an educational, benevolent or charitable object, for which similar obligations of others have been given, there is a good consideration. In the absence of other like obligations such an instrument so given cannot be enforced against the maker.¹⁰ Where a sufferer from a fire received from a relief committee money raised by voluntary subscription to benefit him and others and gave his note for it, the court held that there was a good consideration.¹¹ However a note given by a child to a parent to cover an advancement;¹² and a note given to be used in equalizing the division of a parent's estate, would not be enforceable as a debt or note against the maker.¹³

⁷ Seymour v. Prescott, 69 Me., 376.

⁸ Hall v. Henderson, 84 Ill., 611.

⁹ Rose v. Truax, 21 Barb. (N. Y.), 361.

¹⁰ Simpson College v. Tuttle, 71

Iowa, 596.

¹¹ Bayou Sara v. Harper, 15 La. Ann., 233.

¹² Marsh v. Chown, 104 Iowa, 556.

¹³ Hardin v. Wright, 32 Mo., 452.

A valid consideration is also necessary for the extension of the time of payment of an instrument, or for forbearance to sue upon it at maturity. And part payment, or a payment of interest in advance, before maturity, while then a sufficient consideration for forbearance, are not so after the paper has become due.¹⁴ The giving of new security for over-due paper is however a good consideration for such extension or forbearance.¹⁵

An agreement to pay a note already overdue will create no new liability unless the paper be outlawed, when such new promise will take it out of the statute of limitations, and will be a valid consideration.¹⁶

§22. **Void Consideration.**—Where negotiable paper is based upon an agreement against public safety and policy, as with an enemy in time of war; the corrupt procurement of a public contract; or when given to influence the conduct of a public officer, or the sale of a public office; it is without valid consideration and is void. So also is a note or bill which has as its consideration the compounding of a felony or misdemeanor, or to procure or facilitate a divorce and the like.

A bill or note is also void for want of consideration if it be given to restrain or prevent a marriage; or in restraint of trade; or is based on a bet or wager. Nor can there be any valid consideration for an instrument if it is given in violation of any express statutory provision. For instance, paper given for lottery tickets, where their sale is prohibited under the law; or for violating a license law, liquor law, or Sunday law will be without valid consideration.

In considering the cases of instruments void by reason of illegality of consideration, there is a distinction between those where the statute declares a contract founded upon such a consideration to be absolutely void, and those where the consideration is held to be void by the courts. In the first instance the instrument is void even in the hands of a bona fide holder for value; in the second it is void only as between the immediate parties, but is good in the hands of a bona fide holder.¹⁷

¹⁴ *Liening v. Gould*, 13 Cal., 598.

¹⁵ *Robertson v. Blevins*, 57 Kan., 50.

¹⁶ *Stallings v. Johnson*, 27 Ga., 564.

¹⁷ *Vallett v. Parker*, 6 Wend. (N. Y.), 615.

It must be remembered however in applying the rule as to consideration, that the question can only be raised between the original parties to the transaction and such subsequent holders as have notice thereof or who take the paper without value,¹⁸ In such cases it is necessary for the defendant to prove not only want of consideration but also that the plaintiff is not a bona fide holder for value. This however does not apply in the cases referred to above where the consideration is nullified by statute, and an instrument so given is of no value in the hands of any person whatsoever.

§23. Good and Valuable Considerations Distinguished.—Consideration is divided into two principal classes; good and valuable. Good consideration is the natural love and affection of near relatives, such as prompts the bestowal of benefits. Commercial paper based upon such consideration, so long as it does not pass into the hands of a holder for value, cannot be sued upon.¹⁹

Valuable consideration however is anything which has a pecuniary or monetary value. Not necessarily money itself, but either that or its equivalent. An action on commercial paper can only be sustained by the original holder thereof, when it is based upon a valuable consideration.²⁰

¹⁸ United States v. Bank of Metropolis, 40 U. S., 393.

¹⁹ Harris v. Harris, 69 Ind., 181.

²⁰ See, generally, as to validity of

consideration, the lessons on Contracts, Chapter III—on Consideration.

CHAPTER III.

ACCEPTANCE AND INDORSEMENT.

- §24. Acceptance Generally.
- 25. What Acceptance Is.
- 26. How Acceptance is Made.
- 27. Acceptance Supra Protest.
- 28. Effect of Acceptance.
- 29. Indorsement Generally.
- 30. Kinds of Indorsement.
 - (a) In Blank.
 - (b) Special.
 - (c) "Without Recourse."
 - (d) Restrictive.
 - (e) Qualified and Conditional.
- 31. Indorsement Rights and Liabilities.
 - (a) How Established.
 - (b) Limit and Order of Liability.
- 32. Acceptance and Indorsement of Certain Instruments.
 - (a) Checks.
 - (b) Bank Notes.
 - (c) Certificates of Deposit.
 - (d) Bonds and Coupons.
 - (e) Bills of Lading.

§24. **Acceptance Generally.**—The first important step in the life of a bill of exchange after its delivery is its presentment for acceptance. This must not be confounded with presentment for payment at maturity. The two presentments are of entirely different effect and play entirely different parts. It will be remembered, that both domestic or inland as well as foreign bills of exchange are drawn on some person, either an individual, firm or corporation. It then becomes the duty of the holder of the bill to promptly present it for acceptance to the drawee; for if it be not accepted, it is then dishonored. Nor has such presentment anything to do with indorsement, both occupying entirely different positions and having a liability based on entirely different grounds.

§25. **What Acceptance Is.**—The acceptance of a bill is the agreement on the part of the drawee to pay the bill drawn on him according to its terms, when it becomes due.¹ There is no liability on the part of a drawee until he has agreed, by his immediate acceptance or by a previous agreement, to pay.² As has been said it is the duty of the holder of a bill to promptly present it to the drawee for acceptance; if he fails to do so, he not only loses his claim

¹ Cox v. National Bank, 100 U. S.,² Luff v. Pope, 5 Hill (N. Y.), 413.
712.

against the drawer, but against all other parties—that is, all indorsers and transferrors—liable on the bill.³

In the event that acceptance of a bill be refused and it thus becomes dishonored, it should be protested if it be a foreign bill. In all cases, in the event of a dishonor, notice thereof is required to be given to all parties liable on the bill. When a bill is presented for acceptance the drawee is entitled to have it produced for his examination, and a reasonable time to allow him to determine whether or not he will accept the same.⁴ When a bill is in two or more parts, as we have seen to be the practice regarding foreign bills of exchange, either part may be presented and the drawee need accept only one of them.

§26. **How Acceptance Is Made.**—As has been stated the usual form of acceptance is by writing the word “accepted” across the face of a bill together with the signature of the acceptor. But it has been held that if the drawee simply writes his name across the face—or even on the back—of a bill, it is an acceptance.⁵ An acceptor should be careful in accepting a bill drawn in more than one part, that his acceptance be not placed on any of the other parts, for if he should do so and the accepted parts pass into the hands of different bona fide holders he will be liable on each part on which his name appears.⁶ While there may be an acceptance by parol, i. e. not by writing on the paper,⁷ the holder of paper has a right to refuse such an acceptance. It is now however the general rule by statute that written acceptance is required.

If a bill be drawn on a co-partnership acceptance by one member of the firm will be binding on the firm. Should a bill be drawn on a member of a firm individually, who in accepting it uses the firm name, it will nevertheless be his individual acceptance, and the firm will not be liable.⁸ Care must be taken not to confound a bill drawn against two or more persons jointly, who are not co-partners, and one drawn against a firm. As we have seen, one partner may accept for the firm and the firm will be bound; in the

³ Adams v. Boyd, 33 Ark., 33.

⁴ Connelly v. McKean, 64 Pa. St., 113.

⁵ Haines v. Nance, 52 Ill. App., 406.

⁶ Bank of Pittsburg v. Neal, 63 U. S., 96.

⁷ Joyce v. Wing Yet Lung, 87 Cal. 424.

⁸ Nichols v. Diamond, 24 Eng. Law & Eq., 403.

other instance however only those individuals accepting a bill will be liable,⁹ and as against those not accepting it should be protested.

Acceptance may also be made after a bill has matured and been protested for non-payment, and in such a case the bill is regarded as payable on demand.¹⁰ There may be a qualified or conditional acceptance though a holder is always entitled to an absolute and unconditional acceptance according to the terms of the bill.

While a holder has the option of refusing a conditional or qualified acceptance, yet if he accepts it his duty is at once to notify the drawer and all prior indorsers, for his acceptance of a conditional or qualified acceptance without their consent, discharges them from liability on the paper.¹² "To pay when goods consigned to me are sold;" "to pay as remitted for;" "to pay when cargo of equal value is consigned to me," and acceptances payable at a different time, or at a different place from that named in the bill, are examples of conditional and qualified acceptances. An acceptance "when in funds," or words of similar character, makes the drawee liable only when he is in possession of funds from which he is authorized to pay the bill.¹³

In every case of a conditional or qualified acceptance there is no liability until the performance of the condition, or the happening of the event upon which the promise is predicated.¹⁴ However if the condition or qualification set forth be rendered impossible by the act of God, or of the law, the acceptor is thereby discharged.¹⁵

§27. Acceptance Supra Protest.—Acceptance supra protest, or acceptance for honor, is where the drawee named in a bill refuses to accept it, and the bill has been protested for non-acceptance, when a stranger to the bill—that is one on whom it is not drawn—intervenes and accepts it for the honor of the drawer or for any of the indorsers.¹⁶ If it be not stated for whose honor the bill is accepted it is presumed to be for the honor of the drawer. While acceptance for honor is a conditional acceptance it is an exception to the rule requiring the consent thereto of the drawer and

⁹ *Smith v. Milton*, 133 Mass., 371.

¹⁰ *Stockwell v. Branble*, 3 Ind., 428.

¹¹ *Ford v. Angelrodt*, 37 Mo. 50.

¹² *Gibson v. Smith*, 75 Ga. 33.

¹³ *Marshall v. Clary*, 44 Ga., 513.

¹⁴ *Everard v. Warner*, 36 Minn., 383.

¹⁵ *Rawson v. Beach*, 13 R. I., 151.

¹⁶ *Walton v. Williams*, 44 Ala., 347.

the previous indorsers. The practice in such cases is to make this kind of an acceptance before a notary public, that it may thus be clearly established.

When a bill of exchange is accepted and delivered to the holder, it is irrevocable even though the holder may consent thereto, for it is well settled that the drawer and indorsers have a vested interest in an acceptance.¹⁷

§28. **Effect of Acceptance.**—The acceptance of a bill admits the drawer's signature as well as his legal capacity and his authority to make the bill.¹⁸ The drawee also by his acceptance admits that he has in his possession funds of the drawer to pay the bill.¹⁹ There cannot be an acceptance in the legal sense of the term, of a promissory note although frequently when a note is made payable at a bank, the bank upon presentation issues its certificate that it has funds wherewith to pay it. This however is virtually a certification, and not an acceptance, for it imposes upon the bank an absolute obligation to pay.²⁰

In the case of a written promise to pay a non-existent bill—one not yet drawn—there has been considerable variance of judicial decision. The position however taken by Chief Justice Marshall in the leading case on that subject in which he says that “a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise,”²¹ has been followed by the best authorities. This has also been held to apply to like agreements by telegraph.²²

§29. **Indorsement Generally.**—It should also be borne in mind that acceptance and indorsement are entirely distinct identities legally, and that the liability involved is likewise different. It must be understood that the law affecting indorsements applies to bills of exchange, notes,

¹⁷ Anderson v. First Nat. Bank, 1 McCrary, 252.

¹⁸ Hoffman v. Milwaukee Nat. City Bank, 79 U. S., 181.

¹⁹ Heermance v. Morris, 101 N. Y., 63.

²⁰ Mead v. Merchants Bank, 25 N. Y., 148.

²¹ Coolidge v. Payson, 15 U. S., 31.

²² Central Sav. Bank v. Richards, 109 Mass., 414.

and, in fact all instruments wherever indorsement is permitted. In all such cases the liability of the indorser is in a general way the same.

As we have already seen,²³ an indorsement of commercial paper accompanied by its delivery is virtually the transfer of the paper by one party to another, and is usually made by the holder writing his name across the back of the instrument.²⁴ An indorsement however may be made on a separate piece of paper attached to the instrument itself, called an *allonge*,—meaning, a rider. In practice an *allonge* is used only when the back of an instrument is filled with indorsements and space is required for more indorsements.

An indorsement is not only the transfer of the paper and an undertaking to pay it upon notice of its dishonor, but also carries with it a warranty as to title thereto in the indorser, and as to its genuineness and validity, and the legal capacity of the parties.²⁵

§30. **Kinds of Indorsement.** (a) **In Blank.**—Indorsement may be general or special; in blank, or in full. The usual form of indorsement, by simply writing the name across the back of the paper, is termed a general indorsement, or an indorsement in blank. That is to say it is indorsed generally, not being made payable to any designated person. Under such an indorsement instruments can be passed by mere delivery from one party to another without necessarily being indorsed by the subsequent holders. While this may be done legally it is customary to require each transfer or transferee of an instrument to indorse it, so as to be able to show a chain of title in the instrument. Furthermore, any one to whom paper indorsed generally—or in blank—has been delivered, may, as the holder of the paper, fill in the blank above the indorser's name, making the indorsement special, if he so desires.

(b) **Special.**—An indorsement is special, or in full, when it designates the indorsee by name or otherwise, such as, "Pay J. L.," or, "Pay J. L. or order;" or "Pay to the order of J. L." When an indorsement is special or in full, the paper can only be transferred by the indorsement of the

²³ Ante, §6 (b).

²⁴ Higgins v. Bullock, 66 Ill., 39.

²⁵ Kenworthy v. Sawyer, 125 Mass.,

28; Turnbull v. Bowyer, 40 N. Y., 456.

person named therein. Under such an indorsement the paper cannot legally pass by mere delivery.²⁶ In order to transfer an instrument with all its original incidents as to negotiability, it is not necessary, where there is a special indorsement, to use the words "or order," to make the paper further negotiable. These words are required only in the making of the paper and an instrument originally negotiable remains so irrespective of the character of its indorsements,²⁷ unless some indorsement specifically transfers it only to a person therein named, as "Pay to J. D. only."

A general indorsement or indorsement in blank may subsequently be made special by any indorser before its delivery to another by writing above his name the words necessary to make it such. In a similar manner where there is a special indorsement, it can be made general by the indorser, before delivery.²⁸ Any indorser has the right to enlarge or restrict his own liability previous to delivering his indorsed paper to another.

(c) "**Without Recourse.**"—An indorsement "without recourse," is where the indorser exempts himself from liability in the event of the dishonor of the paper. Such an indorsement is made by adding to the signature of the indorser, the phrase, "without recourse," or other words equivalent thereto. While this renders such an indorser free from liability to pay the paper, it does not affect the liability of the maker or of other unrestricted indorsers. An indorsement "without recourse" while exempting the indorser from liability of payment, carries with it, however, a warranty as to the genuineness of the paper, the indorsers right to transfer it and that the previous parties are legally competent.

(d) **Restrictive.**—A restrictive indorsement is where certain terms are contained in the paper restricting its use. In some states particular words are required for this purpose. Examples of restricted indorsements are, "Pay to J. L. only;" "to J. L. for my use;" "for my account;" "for account of J. L." and the like. While such an indorsement

²⁶ Fawsett v. National Life Ins. Co.,
97 Ill., 17.

²⁷ Fawsett v. National Life Ins. Co.,
supra.

remains in effect it destroys the negotiability of the paper.²⁹

The most common form of restrictive indorsement are the words "for collection," frequently placed on paper when it is turned over to a bank for the purpose of collection. The legal advantage following such an indorsement is that the title to paper so indorsed remains in the indorser—does not pass to the bank, in other words—so that in case of the failure of a collecting bank while the paper or its proceeds is in its hands, the indorser can prove title thereto and claim it. "For Deposit" is another usual form of such indorsement, the legal effect of which is that a bank accepting paper so indorsed thereby credits the depositor at once with its amount, and does not do so conditionally upon its being collected.

(e) **Qualified and Conditional.**—A qualified indorsement is one where the indorser restrains, limits, qualifies or enlarges his liability from what the law implies to be his true liability.³⁰

A conditional indorsement is one that is made upon a condition, either to give effect to or to avoid an indorsement. It may be either a condition precedent or subsequent, and the indorsement is not binding upon the indorser unless the condition be fulfilled.³¹ To illustrate: "Pay to J. L. or order provided he arrives at the age of twenty-one years." is an indorsement upon a condition precedent. "Pay to J. L. or order, unless before maturity I notify you to the contrary," is an indorsement upon a condition subsequent.

§31. **Indorsement Rights and Liabilities.** (a) **How Established.**—In every case before legal liability attaches to an indorser there must be a delivery of the paper to some transferee. Such delivery need not necessarily be made in person; it may be made by messenger or by mail.³² The law of the place where an indorsement is made governs the liability of the indorser.³⁴ The lawful possession of a

²⁹ *Mechanics Bank v. Valley Packing Co.*, 4 Mo., 200.

³⁰ *Turley v. Hodge*, 3 Humph. 83. ³² *Mendenhall v. Baylies*, 47 Ind., 577.

³¹ *Tenn.*, 73. ³³ *Canterbury v. Bank of Sparta*, 91 Wis., 57.

³⁴ *Johnson v. Barrows*, 12 La. Ann., 34. ³⁵ *Moore v. Clopton*, 22 Ark., 125.

negotiable instrument confers on the holder all rights and title to the instrument, but mere possession without legal title is not sufficient.³⁵ A forged indorsement passes no title to paper; and forgery is committed if an indorsement be made by an actual person bearing the same name as the payee or indorsee but not in fact the party in interest.³⁶

Power to indorse may be delegated to an agent, and when duly authorized he has all the legal powers of his principal for that purpose. Such authority however must be expressly conferred.³⁷ In the event of the death of a party to an instrument his executor or administrator has power to indorse, and to transfer same.³⁸

While indorsement may be made either before or after the maturity of an instrument, if made afterwards a holder so receiving it takes it subject to all the defenses and equities existing between the original or any previous parties thereto, as distinguished from the right of one who takes before maturity against whom no such defenses are allowed.³⁹ Although in order to pass legal title to paper indorsement thereof is necessary, the equitable title may be passed by mere delivery without indorsement.⁴⁰ Where an indorsement is omitted by accident, mistake or fraud, it may be compelled by proper legal action. When obtained the liability and rights of such an indorsement relate back to the time of the transfer of the instrument.⁴¹ An instrument payable to two or more persons who are not partners must be indorsed by all of them in order to pass the full title thereto, unless one is authorized to sign for all⁴² in which event he must sign the name of all as indorsers.

An indorsement may be made to anyone, even to persons laboring under legal disability such as infants, insane persons and married women.⁴³

(b) **Limit and Order of Liability.**—Where an indorser desires to exempt himself from full liability his in-

³⁵ *Andrews v. Bond*, 16 Barb. (N. Y.), 640.

³⁶ *Beattie v. National Bank*, 174 Ill., 571.

³⁷ *Whitney v. Western Stage Co.*, 20 Iowa, 554.

³⁸ *Nelson v. Stallenwerck*, 60 Ala., 140.

³⁹ *Cole v. Stearns*, 46 N. Y. Supp.,

238; and see closing paragraphs of §3, ante.

⁴⁰ *Van Riper v. Baldwin*, 19 Hun. (N. Y.), 344.

⁴¹ *Southard v. Porter*, 43 N. H., 379.

⁴² *Rhyhlmer v. Fickert*, 92 Ill., 315.

⁴³ *Philliskirk v. Pluckwell*, 2 M. & S., 393.

tention so to do must clearly appear from the indorsement itself, otherwise he will be held fully responsible as an indorser. A firm was closing up its business and was succeeded by a new partnership in which one of the old firm was a member. This party indorsed a note on account of the old firm, thus: "B. & H, old fir min liquidation" and signed it. In an action against him as indorser it was contended by him that the indorsement showed that it was made for the mere purpose of transferring title to the note, but the court held that this position could not be sustained and that the words inserted did not clearly express an intention to limit his personal liability, failing in which he was held to his indorsement.⁴⁴ But in a case where an indorsement read, "For value received, etc. I transfer unto J. P. H., all my right and title to the within note, to be enjoyed in the same manner as may have been by me," the court held the indorser was exempted from personal liability thereon, as the indorsement clearly showed that he reserved no right in the paper.⁴⁵

Where an indorsement read "For value received we guarantee the payment of the within note, and hereby waive demand, and notice of non-payment," it was held, that the writing constituted an indorsement with an enlarged liability.⁴⁶

An indorsement cannot be for less than the full amount of the instrument. Hence where an indorsement said: "Pay to A. P. L. or order Four hundred dollars out of this note," the court held such indorsement to be void.⁴⁷ It is not usual to date an indorsement, but in the absence of a date it is presumed to have been made before the maturity of the paper.⁴⁸

Where there are several successive indorsements the order in which the names appear on the paper *prima facie* represents the order in which the indorsements were made and so determines the order of liability of the indorsers.⁴⁹ This may be overcome by proof of an arrangement between the parties involving a different order of liability. In the

⁴⁴ Fassin v. Hubbard, 55 N. Y., 469.

⁴⁵ Hailey v. Falconer, 32 Ala., 536.

⁴⁶ Robinson v. Lair, 31 Iowa., 14.

⁴⁷ Rhinehart v. Schall, 69 Md., 352.

⁴⁸ Frank v. Kaigler, 36 Tex., 305.

⁴⁹ Lewis v. Parker, 31 Eng. Com. Law, 200.

case of accommodation paper an indorser has the right to rescind his obligation and is entitled to the cancellation of the instrument at any time before it is negotiated.⁵⁰

§32. **Acceptance and Indorsement of Certain Instruments.**—(a) **Checks.**—Checks not payable to bearer or to a named person only, whether uncertified or certified pass by indorsement. The certification of a check has been said to be “equivalent to an acceptance,” and as in case of acceptance makes the bank the principal debtor.⁵² There is no necessity however for the holder to present a check for acceptance as he is entitled to payment on demand in any event; but where a holder desires to keep a check in circulation and still feel assured that the bank will pay it when presented, the practice of certification, or acceptance, has now become quite common.

Acceptance of a check in the legal sense which we have been using it in this lesson is not contemplated or permissible in law, because the very nature of a check precludes this form of acceptance for the reasons already given.⁵³

(b) **Bank Notes.**—Bank notes and government treasury notes, require neither acceptance nor indorsement. They are in effect money, and intended to be used as such. They pass current by simple delivery because of the character of their source. Indorsement would add nothing to their value or security. Being payable in coin on demand they require no acceptance to insure redemption.

(c) **Certificates of Deposit.**—Certificates of deposit pass by indorsement and the rights and liabilities of the parties thereto is practically the same as in the case of notes, bills of exchange, and other commercial instruments.⁵⁴ There is the important characteristic pertaining to these instruments that no right of action thereon accrues to the holder until they have been actually presented for payment and payment demanded and refused.⁵⁵ Being issued by banks they require no acceptance.

⁵⁰ *Smith Exer's. v. Wyckoff*, 3 Sandf. Ch. (N. Y.), 89.

⁵¹ *Merchants Bank v. State Bank*, 10 Wall., 648.

⁵² See §7, Ante.

⁵³ *First Nat'l Bank v. Leach*, 52 N. Y., 350.

⁵⁴ *Poorman v. Mills Co.*, 35 Cal., 118.

⁵⁵ *McGough v. Jamison*, 107 Pa. St., 336.

⁵⁶ *McGough v. Jamison*, 107 Pa. St., 336.

⁵⁷ *Morgan v. United States*, 113 U. S., 491.

(d) **Bonds and Coupons.**—Bonds, and coupons when detached from their bond, also pass by delivery and indorsements in a similar way.⁵⁶ Acceptance is not required thereof as they are the undertaking of their principal obligors. The legal rules applicable to indorsements and to indorsers of other negotiable instruments, apply with full force and effect to these.

(e) **Bills of Lading.**—Bills of lading are transferred by indorsement and delivery of the instrument, and pass whatever title to the goods thereby called for, that the transferor had at the time.⁵⁷ There is however this important fact to be kept in mind, that a bill of lading stands for the goods only during their transit and until they are delivered to the person entitled to them as therein called for.⁵⁸ Mere arrival of the goods at the point of destination is not enough to prevent a bill of lading from being legally transferred by indorsement. This can be done up to the time actual delivery thereof to the consignee takes place.⁵⁹

⁵⁷ Missouri Pacific R'wy v. Heidenheimer, 82 Tex., 199.

P., 38.

⁵⁸ Meyerstein v. Barber, L. R., 2 C.

⁵⁹ Cairo First Nat. Bank v. Crocker, 111 Mass., 163.

QUIZZER.

CONSIDERATION

- 1-§20. Does commercial paper require a consideration?
- 2- To what parties thereto does this apply?
- 3- Would the consideration for the making of a note support an indorsement after delivery?
- 4- What is the rule as to separate consideration?
- 5- What law fixes the kind of consideration necessary?
- 6- Must the consideration equal the face of the instrument in order to be valid?
- 7- Is buying of paper below its face value taking it out of the usual course?
- 8- Is inadequacy of consideration material?
- 9- State the exception if any.
- 10-§21. Is the loan of money or the sale and delivery of goods a good consideration?

- 11- Does this apply to an advance of money?
- 12- If the maker of an instrument requests a loan or advance to a third person, would that be a good consideration?
- 13- If the note be given for a liability incurred at the time, but payable in the future, is there good consideration?
- 14- Is a note given to secure a debt possessed of a good consideration?
- 15- If a note be given by a person to extinguish the debt of another, is there a good consideration?
- 16- What is the important fact to be considered in this class of cases?
- 17- Is exchange of paper a good consideration?
- 18- Must the exchanged instruments be for the same amount?
- 19- Are they related to each other in any manner, or under any circumstances?
- 20- Is non-payment of the obligation under any circumstances available as a set-off?
- 21- Are services a valuable consideration?
- 22- What nature of services if any are such as would be considered a good consideration?
- 23- Are there any services that might not form the basis of a good consideration?—if so name them.
- 24- Are services to be rendered in the future a good consideration?
- 25- Are services without a pecuniary character a good consideration?
- 26- Give an instance of such a case.
- 27- Is an obligation given as a subscription to an educational, benevolent or charitable object good under any circumstances—if so, when?
- 28- If a note be given by a person who receives aid from a relief committee, for that aid, where the fund from which he received such aid was raised for the express purpose, is there good consideration?
- 29- Can a parent collect on a note given by his child to cover an advancement to him—and why?

- 30- Is a note enforceable against the maker if given to equalize an interest in the parent's estate—and why?
- 31- Is a consideration necessary for the extension of a note?
- 32- Is this also true as to a forbearance to sue upon it?
- 33- Is part payment before maturity a good consideration for forbearance?
- 34- How as to a payment of interest in advance before maturity?
- 35- How would you answer the two foregoing questions if the facts stated in them occurred after maturity?
- 36- Would the giving of new security for the extension or forbearance affect it in any way—if so, how?
- 37- Under what circumstances if any would an agreement to pay an overdue note create a new liability?
- 38-§22. What nature of agreements, if any, are of such a character that a paper if given against them are void as against public safety?
- 39- Would a note given for the purpose of facilitating a divorce be good—and why?
- 40- Would a note which was given to violate a license law be good—and why?
- 41- Give an instance of a note that would be void for want of consideration.
- 42- Is there any distinction between the case of a note given for a consideration held to be absolutely void, and one held void by the courts—if so, state it?
- 43- What is the rule in this respect?
- 44- Between whom can the question of consideration be raised?
- 45- What proof is required as to subsequent holders?
- 46-§23. Into what classes is consideration divided?
- 47- Define “good” consideration.
- 48- Is paper based upon such consideration good, and under what circumstances?
- 49- Define “valuable” consideration—and distinguish from merely “good” consideration.

ACCEPTANCE AND ENDORSEMENT

- 1-§24. What do you understand to be the first thing to be done upon receipt of a bill of exchange?
- 2- Is there any difference between presentment for acceptance and presentment at maturity—if so state same.
- 3- When a bill is presented for acceptance and not accepted, what then becomes its legal status?
- 4-§25. What is the agreement entered into upon acceptance?
- 5- Is there any liability before acceptance?
- 6- If the holder fails to present for acceptance, what is the legal result?
- 7- If a bill is dishonored what is incumbent on the holder?
- 8- Is the drawee entitled to see the bill before acceptance?
- 9- Must he accept or refuse same immediately on presentation?
- 10- In the case of a foreign bill of exchange drawn in triplicate, is it sufficient to present one part or must all be presented?
- 11- Is a drawee required to place his acceptance on one part, or must he place it on all of them?
- 12-§26. How is acceptance of a bill usually indicated?
- 13- Can it be indicated in any other manner?
- 14- In the case of a foreign bill of exchange where the acceptor writes his name across all of the parts what is his liability?
- 15- May there be an acceptance by parol?
- 16- Is the holder bound to accept such parol acceptance if it is offered?
- 17- If a bill of exchange be drawn on a firm and accepted by one member of the firm would such acceptance bind the firm?
- 18- In the case of a bill drawn on a person who is a member of a firm, and in accepting it he uses the firm name, who will be liable?
- 19- Is there any difference as to acceptance between a bill drawn on a firm and one drawn against two or more persons jointly?—if so state same.

- 20- If in the case of a bill being drawn against two or more persons jointly all of them do not accept, what is the rule as to liability, both as to those accepting and those declining to do so?
- 21- Can a bill be accepted after it has been protested?
- 22- If a bill be accepted when is it payable?
- 23- May there be a qualified or conditional acceptance?
- 24- Is a holder bound to receive such an acceptance?
- 25- If such an acceptance be taken, what is the holder's duty as to the drawer and prior indorsers?
- 26- If such conditional or qualified acceptance be taken without their consent how is their liability affected?
- 27- Give an example of a conditional or qualified acceptance.
- 28- When do you consider the drawee becomes liable if his acceptance reads, "when in funds?"
- 29- What is necessary in order to fix liability in the case of a conditional or qualified acceptance?
- 30- Are there any conditions under which such acceptances are discharged by reason of the happenings of other events—if so what?
- 31-§27. What do you understand by acceptance "supra protest?"
- 32- For whose account may such acceptance be made?
- 33- Is there ever any presumption as to for whom the acceptance is made?—if so what?
- 34- What kind of acceptance would you term an acceptance supra protest?
- 35- Is there any different rule to be followed in this, from other conditional acceptances?
- 36- Before whom should such acceptance be made?
- 37- Can an acceptance of a bill of exchange be revoked—if so when?
- 38-§28. What is admitted by the acceptance of a bill?
- 39- Can there be an acceptance of a promissory note?
- 40- If a bank accepts a note there payable what is its liability?

- 41- What do you understand the rule to be as to a promise to accept a non-existing bill of exchange?
- 42- Does this rule apply to promise by letters, or to any other mode of communication?
- 43-§29. In your opinion is acceptance and indorsement the same?
- 44- Does the law differ as to the liability of an indorser on a bill of exchange from an indorser on a promissory note?
- 45- What is an indorsement?
- 46- Must it necessarily be on the instrument itself?
- 47- If not, where can it be made and when, and what is the name of that on which it is then placed?
- 48- Do you understand the indorsement to be any more than the transfer of the paper?
- 49- If it has any other significance, what is it?
- 50- Are there any warranties involved in an indorsement—if so name them?
- 51-§30. Name the different forms of indorsement.
- 52-(a) What is the usual form of indorsement?
- 53- What kind of an indorsement is that called, and what is its effect upon the instrument?
- 54- What rights as to an indorsement, has one to whom paper has been transferred by a blank indorsement?
- 55-(b) What is a special indorsement?
- 56- Give an example of a special indorsement.
- 57- What is the rule as to transfer when the paper has a special indorsement?
- 58- Is it necessary to use the words “or order,” to make an instrument with a special indorsement, further negotiable?
- 59- Can a general indorser make his endorsement special?
- 60- How is it done?
- 61- Can a special indorsement be made general?
- 62- If so, by what method?
- 63- Give the reason for the rule.
- 64-(c) What is meant by an indorsement “without recourse.”

- 65- What is the effect of such an indorsement on the liability of the party making it?
- 66- Has such an indorsement any effect on the liability of the maker or other indorser?
- 67-(d) What is a restrictive indorsement?
- 68- Give examples of such an endorsement and state their legal effect.
- 69- When an instrument is indorsed "for collection," what kind of indorsement is it?
- 70-(e) What is a qualified indorsement?
- 71- Define a conditional indorsement.
- 72- When does a conditional indorsement become binding?
- 73- Give an example of an indorsement with a condition precedent.
- 74- Give an example of an indorsement with a condition subsequent.
- 75- Is there any difference as to the warranty between the different forms of indorsement—if so what?
- 76-§31. Is an indorser liable before the delivery of the instrument?
- 77-(a) Must delivery be made in person—if not how otherwise can it be made?
- 78- What law governs the liability of an indorser?
- 79- What is necessary to confer title and the possession of all rights to the holder of paper?
- 80- Is mere possession sufficient?
- 81- Does a forged indorsement pass title?
- 82- Can power to indorse be delegated?
- 83- What authority would such agent have?
- 84- Must such authority be expressly conferred or may it be presumed?
- 85- Has an administrator or executor power to endorse?
- 86- When may the paper be indorsed?
- 87- What is the difference in liability between an indorser before maturity and one after maturity?
- 88- How can the equitable title to an instrument pass?

- 89- How does this differ from the manner in which the legal title passes?
- 90- If endorsement is omitted are there any cases in which it may legally be compelled?
- 91- What are the cases in which this may be done?
- 92- When indorsement is so compelled, to what time does it relate?
- 93- If the instrument be payable to two or more who are not partners by whom must the indorsement be made?
- 94- Can they delegate that authority?
- 95- If this be done what names should appear on the indorsement?
- 96- Can a paper be indorsed to a person laboring under a legal disability?
- 97-(b) What is the rule where an indorser seeks to exempt himself from liability?
- 98- Can an indorsement be for less than the whole amount of the instrument?
- 99- Is it necessary for an indorsement to bear a date?
- 100- What is the rule when it bears no date?
- 101- How is the order of successive indorsements determined?
- 102- What determines the order of liability of indorsers?
- 103- Can this be overcome—if so, how?
- 104- Can an indorser on accommodation paper at any time rescind his obligation—if so, when?
- 105-§32. How do checks pass from one person to another?
- 106-(a) After certification of a check what is the position of the bank?
- 107- Is the holder required to present a check for certification in order to make the bank liable?
- 108- What do you understand to be the purpose of certification of a check?
- 109- Is it necessary to present a check for acceptance?
- 110-(b) Do bank notes require endorsement?
- 111- How do they pass current?
- 112- Why is indorsement of them unnecessary?
- 113- Do certificates of deposit pass by indorsement?

- 114- What important characteristic is there as regards liability in the case of a certificates of deposit?
- 115-(d) Do bonds and their coupons pass by indorsement?
- 116- Must they be presented for "acceptance?"
- 117- What rules as to indorsement are applicable thereto?
- 118-(e) How may a bill of lading be transferred?
- 119- What title thereto, if any, passes by indorsement?
- 120- What do you understand a bill of lading to stand for?
- 121- Can a bill of lading be transferred after delivery of the goods it calls for?
- 122- Can it be transferred at any time after the arrival of the goods at the point of destination?
- 123- What is the time that fixes when it may or may not be transferred?

LESSON 12.—

CHAPTER IV.

TRANSFER.

§33. Method of Transfer.

34. Rights of Transferee.

(a) Generally.

(b) Holders in Due Course.

(c) Pledges of Commercial Paper.

§33. **Method of Transfer.**—The usual method of transferring commercial power is by indorsement, as we have already seen. There are, however, some instances where a transfer may be by delivery without indorsement, as where the paper is payable to bearer or to cash; but otherwise a transfer is usually by indorsement. Indorsement differs from the ordinary method of the transfer of choses in action which is accomplished by assignment thereof, and whereby the assignee takes the title of his assignor with all its infirmities. In the transfer of commercial paper by indorsement before its maturity, however, there are many instances where the transferee obtains a better title even than his transferor had, the legal effect of the indorsement being to absolve the paper, in the hands of a bona fide holder for value, from all defenses good between prior parties.

An assignment not being an indorsement nor in any manner legally equivalent thereto, does not render the assignor liable to his assignee nor to subsequent holders of the paper on any warranty or to indemnify the holder if the maker of the paper dishonors same.¹

There may be an assignment or transfer of negotiable paper as with any ordinary chose in action, but where this occurs it is done by a separate instrument executed for that purpose, and as already stated is not equivalent to an indorsement.²

A transfer by assignment unaccompanied by an indorsement, is subject in the hands of the assignee to defenses good between the prior parties,³ and does not confer upon the assignee the rights of a bona fide holder for

¹ De Hass v. Roberts, 59 Fed. Rep., 856.

² Osgood v. Hartt, 17 Fed. Rep., 575.

³ Osgood v. Hartt, Id.

value.⁴ One who takes commercial paper by an assignment cannot sue thereon, in his own name, but must bring action in the name of the original party for his, the assignee's, benefit—whereas one who takes by indorsement before maturity can sue on the paper in his own name.

An instrument is deemed overdue when payable at a fixed time and upon being presented for payment on that day, during business hours, is not paid. Notice of such non-payment must be given to the indorsers if the order to hold them liable. Where an instrument is payable on demand or at sight, or otherwise no specific time for payment is therein stated, it must—in the absence of statutory provision directing otherwise—be presented within a reasonable time after its issue.

§34. **Rights of Transferees.**—(a) **Generally.**—There is some divergence of opinion as to the rights of a person who endorses a bill to another, either for value or for the purposes of collection, and again, in due course, comes into possession of the bill. Some hold that such a party would acquire additional rights as a subsequent indorsee, while others maintain the contrary,⁵ holding that such party thus receives such paper subject to all defenses, if any, that were good against him when he first possessed it.

One taking a bill *supra protest* is an indorsee for value and entitled to all the rights and remedies of an indorsee in due course against those liable on the paper, even though no formal indorsement or transfer is made to him.⁶

A transfer of paper by an instrument of assignment while not placing the assignor under any of the legal obligations to the assignee that would be involved had the transfer been by an indorsement, and accordingly not giving to the assignee the legal rights that he would have acquired had he received it under an indorsement, still passes title to the instrument from one to the other. An instrument that is negotiable and not due, which is so transferred, cannot by the assignee be transferred by his indorsement—the paper lacking the indorsement of the assignor. In other

⁴ *Hull v. Swarthout*, 29 Mich., 25; *Joseph v. Catron*, 81 Pac. Rep. (N. M.), 439. ⁵ *Dugan v. United States*, 3 Wheat (U. S.), 172.

⁶ *Gazzam v. Armstrong*, 33 Ky., 554.

words, such an assignment terminates the course of paper by indorsement.

(b) **Holders in Due Course.**—In addition to what has been said ⁷ as to the rights of transferees of negotiable paper it may be added that to be a holder in due course, so as to be protected from equities and defenses available between antecedent parties, one must, himself, or through someone through whom he traces title, be a bona fide holder for value, before maturity, in the ordinary course of business and without notice, either actual or constructive, of dishonor, fraud, defect of title, illegality or any other defense that would defeat recovery between such antecedent parties. ⁸ as they follow, and are a part, only, of the legal attributes of an indorsement.

A transfer not being retrospective, the law in force at the time of the transfer is what governs. A transfer is complete upon the executing of the indorsement and the delivery of the paper to the transferee.

(c) **Pledges of Commercial Paper.**—A pledge of commercial paper as collateral or otherwise, does not in general give the pledgee power to sell or transfer it, until the failure of the pledgor to pay the original debt. ⁹ In such event notice of sale is required to be given to the pledgor. The courts have gone so far as to hold that such a sale without such notice being given is absolutely void. ¹⁰ Furthermore such pledgee can enforce it against the maker of the paper only to the extent of his claim against the pledgor—at least where the maker has a valid defense against the pledgor on the note. ¹¹

⁷ Ante §31 (b).

⁸ *Smith v. Livingston*, 111 Mass., 342

⁹ *Lewisby v. Varnum*, 12 Abb. Prac (N. Y.), 305.

¹⁰ *Evans v. Darlington*, 5 Black. (Ind.), 320.

¹¹ *Yellowstone Nat. Bk. v. Gaynor*, 19 Mont., 403.

CHAPTER V.

RIGHTS OF THE PARTIES.

- §35. Holders for Value.
- 36. Extent of Rights.
 - (a) Before Maturity of Paper.
 - (b) After Maturity of Paper.
- 37. What Constitutes "Notice."
 - (a) Express.
 - (b) Constructive.
 - (c) Special Forms of Notice.
- 38. Rights of Bank Discounting Paper.
- 39. Paper as Collateral as Affecting Rights.
- 40. Order of Liability.
- 41. What Constitutes Cause for Enquiry.
- 42. Prima Facie Evidence of Title.
- 43. Negligence in Issuing Paper.
- 44. Paper Procured by Fraud.
- 45. Estoppel, When Raised.
- 46. Rights of Holder in Special Cases.

§35. **Holders for Value.**—A holder, as we have seen is one legally in possession of commercial paper whether as payee or indorsee, or if payable to bearer, the bearer thereof. A holder in due course—or a bona fide holder for value—is one who can trace his title to the instrument through one who received it in like manner, and without notice of any fraud, defect of title, illegality or other defense between the antecedent parties, and who is accordingly protected from all equities and defenses available between such antecedent parties.¹

Whether one is a bona fide holder in due course is largely decided by whether he received the paper in good faith without collusion with any antecedent party. The early English rule was that where a holder took paper under circumstances which ought to have excited the suspicion of a prudent man, he was not a legal bona fide holder.² This rule was later modified by making gross negligence on his part the test of the bona fides of the holder.³ The law however today is as laid down in the case of *Smith v. Livingston*,⁴ which holds that the true question is not whether there were suspicious circumstances attending the transfer, but whether the holder took it without actual notice of any infirmity or taint. The court said, "This rule is simple, easily understood and acted on, and in conformity with the general principles of commercial law which protects the free

¹ *Smith v. Livingston*, 111 Mass., 342.

³ *Goodman v. Harvey*, 31 E. C. L., 212.

² *Gill v. Cubitt*, 10 E. C. L., 154.

⁴ 111 Mass., 342.

circulation of negotiable paper. The other rule laid down in some cases, that an indorsee for value cannot recover if he takes the note without due caution or under circumstances which ought to excite the suspicions of a prudent man is indefinite and uncertain. Circumstances which ought to excite the suspicion of one man might not attract the attention of another."

§36. **Extent of Rights.**—(a) **Before Maturity.**—A bona fide holder may fill in a blank left for the amount in a promissory note, with the sum stated in the margin, unless it was left by mistake, when it may be corrected by a court of equity.⁵ And as we have already learned,⁶ an indorsee holding under a blank indorsement may fill it in any manner to suit his wishes.

Generally, therefore, one holding paper received before its maturity in due course of business, for value given therefore and without notice of any rights or equities against the paper between prior parties, has the legal right to rely implicitly and alone upon what the paper shows on its face, and is legally entitled to recover thereon the full face thereof, plus interest, if it be an interest bearing instrument.⁷

But a transfer of commercial paper before maturity but without indorsement, passes only an equitable title, and notice thereafter given to the transferee of equities between the maker and the payee, will make the transferee subject thereto, even though he subsequently obtains an actual indorsement before maturity.⁸

(b) **After Maturity of Paper.**—After its maturity commercial paper loses its negotiability and is then subject to all the rights and defenses arising between parties thereto before its maturity.⁹ So, an accommodation note paid at its maturity by the real debtor, although he was not a party to the note, cannot thereafter be transferred by him so as to give it validity against the accommodation makers and indorsers.¹⁰

§37. **What Constitutes "Notice."**—(a) **Express.**—Notice as used in connection with the acquirement of com-

⁵ Chestnut v. Chestnut, 104 Va., 539.

⁶ Ante §29 (a).

⁷ Williams v. Neely, 67 C. C. A., 171.

⁸ Pavey v. Stauger, 45 La. Am., 353.

⁹ Y. M. C. A. Gym. Co. v. Rockford Nat. Bank, 179 Ill., 599.

¹⁰ Cottrell v. Watkins, 89 Va., 801.

mercial paper is not necessarily express notice; but it is knowledge, or the means of knowledge, to which a party wilfully shuts his eyes, as to the rights and defenses against the paper, the circumstances of which defenses must be of so strong a character as to put him upon inquiry.¹¹ And it must be understood that a purchaser who takes an instrument with notice of equities or defenses takes subject to them, notwithstanding the fact that he may have paid full value for the instrument.¹²

(b) **Constructive.**—Constructive notice arising either from the appearance of the paper or from extrinsic circumstances may be legally sufficient to put a purchaser on his guard. For example, a restrictive indorsement, or a memorandum showing non-acceptance, or the refusal of a bank to discount, or any other fact or peculiarity out of the ordinary course of unembarrassed commercial paper, as should put a prudent person on inquiry, will be sufficient. So, too, notice to one member of a firm will charge the firm as such on paper which it acquires.

(c) **Special Forms of Notice.**—Newspaper notice or report of alleged facts affecting commercial paper, is no notice whatsoever, legally, to a purchaser in good faith, unless in addition thereto, actual notice be brought home to him.¹⁴ In all of the transactions spoken of herein, notice to an agent representing another is notice to his principal. And though the latter receives no personal notice, due notice to his agent binds him.¹⁵

If a party transfer negotiable paper void in his hands to an innocent holder, and subsequently again comes into its possession by repurchase or otherwise, he is still affected with the original knowledge he had as to the paper and cannot recover from prior parties thereon.¹⁶

§38. **Rights of Bank Discounting Paper.**—A bank discounting commercial paper for one of its customers who is not in its debt, and giving him credit on its books for the proceeds thereof, is not such a bona fide holder for value as to be protected against any equities or defenses there may

¹¹ Greer v. Costi, 56 Mo., 307.

¹² Crampton v. Perkins, 65 Md., 22.

¹³ Powell v. Waters, 8 Cowen (N. Y.), 669.

¹⁴ Clark v. Ricker, 14 N. H., 44.

¹⁵ Savings Bank v. Schott, 135 Ill., 669.

¹⁶ Central Nat'l Bank v. Valentine, 18 Hun. (N. Y.), 417.

be against the paper unless some other consideration passes. This however only continues while the deposit is not drawn out, for nothing has been actually paid or parted with up to that point and is a mere giving of naked credit.¹⁷ But if before receiving notice of any infirmity of the paper, the bank should pay out such proceeds on the check of the depositor, it thereby becomes a purchaser for value and is entitled to protection as such.¹⁸

§39. **Paper as Collateral as Affecting Rights.**—Where there is no reference in an instrument itself as to its being issued as collateral security for another debt, a holder in due course is not bound to inquire whether it is an original or a collateral indebtedness. But where the circumstances show that one wilfully, and for apparent cause, refrained from making inquiry for the reason that he did not desire to become acquainted with any facts against the merits of the paper, he is then not a holder in good faith without notice.¹⁹

§40. **Order of Liability.**—A bona fide holder who takes paper without due notice of any defenses has the right to treat the parties thereto as liable to him in the order, and to the extent, they appear on the instrument. Any knowledge of defenses to the paper acquired by him subsequently to his becoming the holder thereof, in no way affects his legal rights as a bona fide holder.²⁰

§41. **What Constitutes Cause for Inquiry.**—Where a holder acquires paper in the usual course of business, anything upon its face, or in the mode of its transfer to him that is of an unusual or peculiar character is sufficient legally to put him upon inquiry. He therefore under such circumstances takes it at his peril and subject to all equities and defenses between the original parties.²¹ Accordingly if a transferee should take an equitable assignment of paper, not at the time in the possession of his transferor, he would not be a holder in due course of trade.

So, too, where one takes overdue negotiable paper he does so subject to all defenses and equities. This is true even though he has taken it without notice and for value;

¹⁷ *Kost v. Bender*, 25 Mich., 515.

¹⁸ *Dreilling v. First Nat. Bank*, 43 Kan., 197.

¹⁹ *Schmueckle v. Waters*, 125 Ind.,

265.

²⁰ *Colby v. Parker*, 34 Neb., 514; see also, ante §31 (b).

²¹ *Roberts v. Hall*, 37 Conn., 205.

the fact that the paper is in circulation after its maturity being of itself legally sufficient to put him on inquiry.²² These equities are those growing out of the instrument itself; as to collateral matters the holder takes unaffected by them.²³

§42. **Prima Facie Evidence of Title.**—The possession of negotiable paper payable to bearer, or if payable otherwise, indorsed in blank or to the holder specially, is prima facie evidence of title. Such holder is presumed to have taken it in good faith for value before maturity in the usual course of business and without notice.²⁴

Such presumption throws the burden of proving that paper is defective, upon the one attacking the title and making the defense against it. If it be shown that an instrument was lost by, or was stolen from, the true owner; or that it is tainted with fraud or illegality in its inception; or that it was obtained by fraud or duress; such presumption is thereby overcome. The holder must then show affirmatively that he is a bona fide holder for value, and that he or someone through whom he traces title, took the paper in good faith without notice, before maturity, and in the usual course of business.²⁵

§43. **Negligence in Issuing Paper.**—Negotiable paper even though originally procured by fraud may, when in the hands of a bona fide holder for value, be recovered upon, unless at the time of its purchase, it was absolutely void. The mere fact that the maker did not intend to sign such a paper, but one of entirely different character, is of no avail.²⁶ Where the maker is negligent in signing an instrument, a bona fide holder may recover thereon no matter how gross the fraud perpetrated by reason of such negligence. The reason for this rule is that where one of two innocent persons must suffer by the act of a third, the one whose action, negligence or omission enabled such third person to occasion the loss must sustain it.²⁷

What constitutes such negligence is a question to be determined by a jury from the facts and circumstances of each

²² Morgan v. United States, 113 U. S., 499.

²³ National Bank v. Texas, 20 Wall (U. S.), 72.

²⁴ Cook v. Norwood, 106 Ill., 562.

²⁵ Conant v. Johnson, 165 Mass., 450.

²⁶ Parkersburg Bank v. Johnson, 22 W. Va., 520.

²⁷ Citizens Bank v. Smith, 55 N. H., 593.

case;²⁸ although when a particular state of facts is either admitted or not disputed, the question whether negligence existed is then a matter of law for the court to determine.

People who are infirm, decrepit, aged or ignorant, and whose paper is in circulation, are as a rule defendants in this class of cases. Whether negligence existed in their action in issuing the paper rests entirely on the facts of the case. But where a person possessing ordinary faculties signs an instrument without reading it, or being unable to read trusts entirely to the representations of a stranger, as to its contents, he has no legal defense to the instrument in the hands of a bona fide holder.²⁹

§44. **Paper Procured by Fraud.**—There is a class of cases however where no commercial instrument of any kind was ever executed and yet where parties are sought to be held as upon commercial paper. For instance, the name of a person may be signed by him to a blank piece of paper for a purpose entirely foreign to the making of a note, and which was afterward filled out as a promissory note, circulated as such and reached the hands of a bona fide holder, for value. In such cases, and all others of similar character the instrument never existed in contemplation of law and no recovery can be had thereon even in the hands of a bona fide holder.³⁰

There seems to be a distinction between this class of cases and those depending upon whether or not there was any confidence reposed by the signor in the person to whom the signature was given. For instance, where a man signed his name to a piece of paper in which it was supposed an evaporator was ordered but the space was filled by the party who received the signature by framing a promissory note;³¹ or where one signed a paper the blank space above which was to be filled out by the one to whom he entrusted his signature with an order on a savings bank, but instead a promissory note was written in;³² such note will be held good in the hands of a bona fide holder. This, on the principle above stated that where one of two parties must suffer

²⁸ *Becker v. Hart*, 120 N. Y., Supp., 270.

²⁹ *Ort v. Fowler*, 31 Kan., 478.

³⁰ *Cline v. Guthrie*, 42 Ind., 227.

³¹ *McDonald v. Muscatine Nat. Bank*, 27 Iowa, 319.

³² *Breckenridge v. Lewis*, 84 Me., 349

loss from a wrong he whose act or negligence made the wrong possible, must bear the loss.

On the same principle where an instrument had an existence, and possession thereof was obtained through the negligence of the person executing it; or even if through his negligence it was materially altered prior to coming into the hands of a bona fide holder, such holder can nevertheless recover thereon. Furthermore for like reason if a document be so drawn that part of it can be easily detached, leaving a perfect commercial instrument, the latter may be recovered on in the hands of a bona fide holder for value.³³ And where an instrument contains blanks and is filled up in a manner even amounting to a fraud, there may be a recovery on it in the hands of such a holder.³⁴ All of which shows that one must be careful what instruments he signs, or he may well pay for his negligence.

§45. **Estoppel, When Raised.**—If a purchaser however having some doubt regarding the paper, should make inquiries concerning it before purchasing, and receive assurances of its genuineness and legality, and buys it relying upon such assurances, those giving them will be prevented from thereafter setting up any defense against such holder.³⁵ In order to so operate however, such representation must be made after the execution of the instrument, to a person expecting to purchase the same, and he must rely on its truth. But the fact that the instrument itself has attached to it a statement which sets forth substantially the same facts as those made by an individual answering inquiries, has been held hardly sufficient.³⁶

§46. **Rights of Holders in Special Cases.**—The mere fact that a transferee knows that paper is accommodation paper does not prevent him from being a bona fide holder. There is sufficient consideration therefor if value is paid to the party for whose accommodation the instrument was executed and negotiated.³⁷

As to what amount is recoverable by a bona fide holder of an instrument, void as between the parties, it is settled that only such sum as may have been actually paid for it

³³ Brown v. Reed, 79 Pa. St., 370.

³⁴ Ledwith v. McKim, 53 N. Y., 307.

³⁵ Rudd v. Matthews, 79 Ky., 479.

³⁶ Jaqua v. Montgomery, 33 Ind., 46.

³⁷ Jones v. Berryhill, 25 Iowa, 298.

by the holder with interest thereon, can be recovered by him.³⁸

Where an instrument is held by a person who holds or indorses it in an official or fiduciary capacity, the purchaser thereof is put upon his inquiry as to the former's authority, title and right to hold and to transfer the paper.³⁹

It is well settled too, that a holder is not necessarily required to prove that he paid value for the instrument provided it is established that his predecessor in ownership was such a purchaser. In other words, if any previous holder was a bona fide holder, the present holder, without showing that he himself paid value, can avail himself of the legal position of such previous holder.⁴⁰

CHAPTER VI.

LIABILITIES OF THE PARTIES.

- §47. Liability of Drawee for Non-Acceptance.
- 48. Effect of Acceptance.
- 49. Principal Debtor on Note.
- 50. Admissions of Maker.
- 51. Acceptor Supra Protest.
- 52. Transferror by Delivery.
- 53. Contract of Indorsement.
- 54. Indorser and Surety Distinguished.
- 55. Liability on Different Forms of Indorsement.
- 56. Indorser of Non-Negotiable Instruments.
- 57. Obligations of Indorser.
- 58. Order of Liability of Indorsers.
- 59. Modification of Indorser's Liability.
 - (a) In General.
 - (b) Oral Proof Showing Modification.
- 60. Liability of Irregular Indorsers.
- 61. Agent When Considered Party.

§47. **Liability of Drawee for Non Acceptance.**—The drawee of a bill of exchange is under no legal obligation to accept it unless for a valuable consideration he has agreed to do so. If he has authorized the drawer to make the draft he is bound to accept it, if it is drawn substantially as authorized, and if all conditions, if any, expressed in the authority so given, be performed.

Accordingly where a drawee for a valuable consideration has, either expressly or impliedly, promised to accept

³⁸ Bain v. Gagnon, 19 Mont., 402.

Bank, 47 N. Y. Supp., 880.

³⁹ Bank of Patterson v. Nat. Broadway ⁴⁰ Montclair v. Randall, 107 U. S., 159.

a draft, and afterwards refuses, so to do, he becomes liable for such breach.¹

§48. **Effect of Acceptance.**—A promise to accept will sometimes be implied by law, from the relationship of the parties, or from the usages of trade.² If the drawee has money in hand belonging or owing to the drawer, it requires but slight evidence as to previous transactions to support such a presumption. If however a drawee should receive notice of the bankruptcy of the drawer before the acceptance, his right to accept is thereby revoked, as the funds in his hands are no longer legally available for the payment of the bill, but are subject to the proceedings in bankruptcy.³

Upon the acceptance of a bill the acceptor becomes the principal debtor thereon, and is the party primarily and originally liable to pay the bill. The drawer and indorsers are merely sureties, liable to pay only upon his default. An acceptor's obligation is similar to that of the maker of a promissory note.⁴

By his acceptance a drawee admits everything essential to the validity of the accepted bill and warrants to a bona fide holder that every essential, necessary to the creation of his liability exists.⁵ For instance, he thereby admits the existence of the drawer and cannot afterwards say that he is a fictitious person, or that he was dead at the time the bill purports to have been drawn. If drawn by a firm he admits the existence of such a firm. So, too, by his acceptance, he admits the genuineness of the signature of the drawer, that of the payee, or of any subsequent indorser.⁶ He does not however vouch for the genuineness of the body of the bill.⁷ He admits the legal capacity of the drawer of the bill, and of the payee to indorse it. This, however, does not include the authority of the payee to indorse, but simply his legal capacity to be a payee.

An acceptance furthermore raises a legal presumption that the acceptor has funds in his hands to pay the bill, and

¹ Riggs v. Lindsay, 11 U. S., 500.

² Helm v. Mayer, 30 La. Ann., 943.

³ Citizens Bank v. First Nat. Bank,
6 Law Rep. (Eng. & Irish App.),
352.

⁴ Capital City Ins. Co. v. Quinn, 73

Ala. 558.

⁵ Jarvis v. Wilson, 46 Conn., 90.

⁶ Holt v. Ross, 54 N. Y., 475.

⁷ White v. Continental Nat. Bank, 64
N. Y., 316.

such presumption is conclusive in favor of a bona fide holder of the bill, for value.⁸

§49. **Principal Debtor on Note.**—The maker of a promissory note is the primary party liable thereon, and where there are two or more makers, their liability is joint or several according to the wording of the note.

§50. **Admissions of Maker.**—The maker of a note thereby admits the existence of the payee, and if payable to a firm or corporation admits their legal existence.⁹ He also admits the existence of the place of payment,¹⁰ and where payable to order, admits the capacity of the payee to indorse.¹¹

§51. **Acceptor Supra Protest.**—An acceptor supra protest agrees to pay the bill on due presentment if it be not paid by the drawee, provided it be duly presented to the latter for payment and protested if unpaid and that he—such acceptor—receive notice of such facts. He is liable to the holder and to all parties to the bill, subsequent to the party for whose honor he accepted it.¹² An acceptor supra protest is bound by all the estoppels which are binding on the ordinary acceptor, and also those that would be binding upon the party for whose honor he accepts.

§52. **Transferror by Delivery.**—A transferror by delivery of a note payable to bearer, or indorsed in blank, incurs no liability upon the instrument and is not responsible on it if it be dishonored at maturity.¹³

He, however, warrants that the instrument is what it purports to be; that it is a valid obligation; that the parties have legal capacity; and that there is no defense arising out of his connection with the instrument which may render it without value. He is liable for the consideration paid him, if it fail in any of these qualities.¹⁴

§53. **Contract of Indorsement.**—Each indorsement of commercial paper is a separate obligation, and a new and

⁸ Kendall v. Galvin, 15 Me., 131.

⁹ Stoutimore v. Clark, 70 Mo., 471.

¹⁰ Brown v. First Nat. Bank, 103 Ala., 123.

¹¹ Wolke v. Kuhne, 109 Ind., 313.

¹² Salt Springs Bank v. Syracuse Savings Instn., 62 Barb. (N. Y.), 104.

¹³ May v. Dyer, 57 Ark., 441.

¹⁴ Daskam v. Ullman, 74 Wis., 474.

independent contract,¹⁵ subject to the law of the place where the indorsement is made.

If a transferror put his name on the back of a paper payable to bearer, or which is indorsed in blank, thereby making the instrument transferable by delivery, he thereby becomes liable as an indorser. An unqualified indorsement imports first, an executed contract for the sale and transfer of the instrument, and, second, an executory contract which binds the indorser to the assumption of a future contingent liability in respect to it,—in other words to pay it if the maker or previous indorser does not.¹⁶ An indorsement without recourse binds the indorser only to the first of these contracts.

§54. Indorser and Surety Distinguished. The obligation of an indorser is entirely different from that of a surety. The obligation of a surety is not an independent contract, but is identical with that of the maker; and such defenses as are available to the maker inure to the surety. An indorser's obligation, however, being a new contract, is separate and apart from that of the other parties to the paper, and may be valid and subsisting though the contracts of the other parties to the instrument be wholly void.¹⁷

§55. Liability on Different Forms of Indorsement.—A qualified indorsement, no matter in what language it may be expressed, is an express declaration of the absence of full or partial responsibility, the operation and effect of which is to render the indorser liable merely as a transferror.¹⁸

If a payee, or indorser, in making the indorsement should use words in the form of an assignment in making the transfer, he will still be liable as an indorser, the purported assignment being treated as an indorsement unless containing words qualifying it. The party making such an indorsement would thereby render himself liable as an indorser and not as an assignor.¹⁹

Where a payee makes his indorsement in the form of a guaranty, however, he is liable as an indorser so far as con-

¹⁵ *Sinker v. Fletcher*, 61 Ind., 276.

¹⁶ *Johnson v. Willard*, 83 Wis., 420.

¹⁷ *Bowman v. Hiller*, 130 Mass., 153.

¹⁸ *Hannum v. Richardson*, 48 Vt., 508.

¹⁹ *Merrill v. Hurley*, 62 N. W. Rep., 958.

cerns the transfer of the instrument, but in all other respects is held as a guarantor.²⁰

§56. **Indorser of Non-Negotiable Instrument.**—The indorsement of a non-negotiable instrument carries with it no guaranty of its payment. It is merely a transfer of its legal and equitable title, unless such transfer be in a form from which the intention to guarantee may be inferred. If he induced the transferee to take the paper by an agreement that he guarantees its payment, he is then held upon his express or implied promise.²¹

§57. **Obligations of Indorser.**—An indorser—otherwise a vendor or transferror of commercial paper by indorsement—is liable in the same manner as a transferror by delivery, although the transferror by delivery is liable only to his immediate transferee, while an indorser is liable to all subsequent bona fide holders.

An indorser warrants to a bona fide holder that the instrument is a valid and subsisting obligation. He warrants the legal capacity of the antecedent parties; that the signatures are genuine; and the legality of the consideration moving between the antecedent parties.²²

Each indorsement of an instrument being equivalent in law to the drawing of a new bill, the indorser engages that, upon being duly presented, the bill will be accepted or paid according to its terms, and that, if not so accepted and paid he will indemnify the holders, provided it be protested for non-payment and proper notice be given him of such dishonor. Both drawers and indorsers therefore are conditional debtors up to the time their liability becomes fixed by notice of dishonor, by the drawee or the maker, when they become absolute debtors, to either of whom the holder may resort.²³

§58. **Order of Liability of Indorsers.**—Indorsers are as a rule liable to each other in the order in which their indorsements successively appear, each being liable to all succeeding indorsers, but not to the preceding ones.²⁴ In this respect, a drawer is legally considered the first indorser on

²⁰ *VanSant v. Arnold*, 31 Ga., 210.

²¹ *Shafstall v. McDaniel*, 152 Pa. St., 598.

²² *Cochran v. Atchison*, 27 Kan., 728.

²³ *Allen v. Chambers*, 13 Wash., 332.

²⁴ *Cogswell v. Hayden*, 5 Oregon, 22.

a bill. This order of liability, however, may be rebutted by proof of the actual relation of the parties, or by an express agreement under which the indorsements were made. As to its bearing upon the rights of a bona fide holder without notice, no such agreement would be admissible to control his rights.²⁵

§59. Modification of Indorser's Liability.—(a) **In General.**—Between the immediate parties to commercial paper one may qualify his liability as he may think fit. If the qualifying terms be expressed in the indorsement, it will control such liability as to all subsequent indorseees. And between such immediate parties an indorser, although his indorsement is absolute, may qualify it by a contemporaneous agreement, which, however, would only affect the immediate parties to the agreement and not subsequent indorseees.²⁶

(b) **Oral Proof Showing Modification.**—The fundamental principle that where a contract has been reduced to writing, the instrument itself is the best evidence of the agreement between the parties, and that parol evidence of a different oral understanding affecting same is inadmissible to vary, qualify or contradict its terms, applies to negotiable instruments with full effect. The applicability of this principle to the contract of indorsement depends upon how far an indorsement is to be considered a complete written contract, so as to bring the case within its operation. The weight of authority in this regard is, that when a payee signs his name across the back of an instrument for the purpose of negotiation; or a subsequent holder for a like purpose writes his name under the indorsement of the payee, parol evidence would be inadmissible to show that his contract was other than that of an indorser. Therefore it cannot be so shown that he intended to bind himself as maker, surety or guarantor, and not as an indorser; or that the indorsement was a qualified one; or that he intended to assume no liability whatever. In fact he cannot introduce any evidence to prove terms or conditions other than those expressed in the instrument, or in his indorsement thereof, itself.²⁷

²⁵ Hill v. Shields, 81 No. Car., 251.

²⁶ Davis v. Brown, 94 U. S., 424.

²⁷ Johnson v. Glover, 121 Ill., 283.

It is competent, however, to admit parol evidence to impeach the consideration or delivery of an instrument, and an indorser may so show as to his immediate indorsee, that there never was a valid delivery of the instrument, or that there was a conditional delivery, and even that the indorsement was a receipt for payment.²⁸

§60. **Liability of Irregular Indorsers.**—The relation and liability of an irregular indorser is one very difficult to define in general terms. His relation to the instrument is anomalous. His liability may be that of an original promisor, a guarantor, or a first or second indorser, depending entirely on the character of the instrument and the purpose for which it was made. Evidence is admissible, as between the immediate parties, to show the actual time of the indorsement;²⁹ but the nature of his liability is a matter that can only be determined according to the jurisdiction in which the case arises.

§61. **Agent When Considered Party.**—If a broker discloses his agency and the name of his principal, he assumes no personal liability in the transaction of making or indorsing paper as such broker or agent. Therefore he does not in such cases warrant the genuineness or value of the instrument which he may transfer by delivery. But if he suppresses information of such agency, or conceals the name of his principal, and accordingly deals with the purchaser as being himself a principal, the latter may hold him to the liabilities of implied warranty, as if he were in fact the principal.³⁰ A broker may of course bind himself by express warranty where he has disclosed his agency, or he may exempt himself from such implied warranties by an express agreement.

²⁸ Stack v. Beach, 74 Ind., 571.

²⁹ Way v. Butterworth, 108 Mass., 509.

³⁰ Worthington v. Cowles, 112 Mass., 30.

QUIZZER.

TRANSFER.

- 1-§33. What is the usual method of transfer of commercial paper?
- 2- How may paper payable to bearer be transferred?

- 3- What is the difference between this method of transfer and that by assignment?
 - 4- Is an assignment equivalent to an indorsement?
 - 5- What is the difference as to liability?
 - 6- Can negotiable paper be assigned,—if so how is it usually done?
 - 7- Is an assignment without indorsement subject to defenses?
 - 8- When is an instrument deemed overdue?
 - 9- If no specific time for payment be stated what is the rule?
 - 10-§34. What is the legal status of one who indorses paper
(a) to another and later in due course, comes again into possession of it?
 - 11- What rights has an acceptor *supra* protest?
 - 12- Distinguish between the rights of a holder under an assignment, and those under an indorsement.
 - 13- Can a negotiable instrument that is assigned be transferred by indorsement by the assignee?
 - 14-(b) Who is a holder in due course so as to be protected from equities and defenses?
 - 15- Is a transfer retrospective?
 - 16- What law governs the transfer?
 - 17- When is the transfer complete?
 - 18- What is the rule as to the power of sale and transfer in relation to pledged paper?
 - 19- Is notice of such sale necessary?
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RIGHTS OF THE PARTIES.

- 1-§35. What is meant by a holder in due course?
- 2- Is good faith important?
- 3- What is the rule laid down in *Gill v. Cubitt*?
- 4- How was this rule modified?
- 5-§36. What is the present law on the subject?
- 6-(a) What right has a holder to fill in the amount left blank in paper?
- 7- What reliance may a holder have upon paper purchased in due course?
- 8- What title passes where paper is passed without indorsement, and subsequently the holder learns of equities against the paper?

- 9-(b) What rights, if any, are modified where paper is acquired after its maturity?
- 10- Can accommodation paper to which the one accommodated was not a party, but is paid by him when due, be transferred by him against the accommodation parties?
- 11-§37. What notice of equities against parties is sufficient to bind a purchaser?
- (a)
- 12- Does the fact that a purchaser has paid value for paper, knowing of defenses thereto, give him any added rights?
- 13-(b) From what may constructive notice arise?
- 14- Will notice to one of a firm bind the firm?
- 15-(c) Is information had from newspaper accounts legal "notice" of facts affecting commercial paper?
- 16- What can you say as to the sufficiency of notice given to one's agent?
- 17- What is the position of a party having notice, who transfers the paper to a third person, and subsequently again comes into possession of it?
- 18-§38. Is a bank which discounts paper of its depositors and gives them credit for the amount on the books a bona fide holder?
- 19- Is there any course by which a bank may attain such relationship to such paper—if so, how?
- 20- How would notice of an infirmity in the paper affect the bank?
- 21-§39. What is the rule as to the necessity of inquiry whether paper is given as collateral security?
- 22-§40. What is the order of liability of indorsers to a holder of paper?
- 23- Does subsequent knowledge acquired by a holder, of equities against paper have any effect on his rights?
- 24-§41. What facts should put a transferee upon inquiry?
- 25- What is the title of one who takes paper that is overdue?
- 26- Does the fact of one's having paid value for paper and having no notice of equity, alter the case?

- 27- Has the fact that the paper is in circulation after being overdue anything to do with this—if so, what?
- 28- Is such a holder affected by collateral matters?
- 29-§42. What is necessary to confer prima facie evidence of title?
- 30- Is there any further presumption—if so, what?
- 31- What is the effect of such presumption?
- 32- Can such presumption be overthrown—if so, what must be shown?
- 33- What is the holder then required to prove affirmatively?
- 34-§43. Can a note procured by fraud ever be recovered upon?
- 35- If the maker should prove that he intended to sign a paper of a different character, would that avail him?
- 36- What is the reason for this rule?
- 37- How is the question of negligence in putting out negotiable paper determined?
- 38- When, if ever, are such questions, questions of law?
- 39- When does such negligence rest on the facts of the case?
- 40- When is it no defense?
- 41-§44. State a case where it was held that a note of this class could not be recovered upon even in the hands of a bona fide holder?
- 42- Give an instance of a case where it was held in this class of cases, that there could be a recovery?
- 43- Upon what ground is the distinction made between these cases?
- 44- Can a paper be recovered on where possession of it was obtained by negligence of the person making it?
- 45- Would the fact that a material alteration existed on the face of the paper make any difference?
- 46- If an instrument was surreptitiously detached from another piece of paper would the rights of a bona fide holder be affected?

- 47- If an instrument showed that a blank therein had been filled up in a way showing fraud, what would be the position of such a bona fide holder?
- 48-§45 If, prior to the purchase of a paper, inquiry was made as to the instrument, and satisfactory assurances were given, how would such assurances subsequently affect the person making them?
- 49- To whom must such assurances be given?
- 50- If the instrument has attached thereto a statement giving such assurances is it sufficient?
- 51-§46. What effect does knowledge that paper is accommodation paper have on one becoming a bona fide holder?
- 52- What can be the recovery on the part of a bona fide holder in the case of an instrument void between the parties?
- 53- If a paper is in the hands of one holding it, in a fiduciary or official capacity, is the person who takes it bound to make any inquiry—if so, what?
- 54- Must a holder prove he paid value for paper—if so, when?

LIABILITIES OF THE PARTIES.

- 1-§47. When is the drawee of a bill of exchange under legal obligation to accept it?
- 2-§48. When will a promise to accept a bill be implied?
- 3- Will the bankruptcy of the drawer before acceptance, alter the case—if so, why?
- 4- Upon acceptance who becomes the principal debtor?
- 5- What then is the position of the drawer and the indorser?
- 6- What is admitted by virtue of an acceptance?
- 7- What, if anything, is not admitted?
- 8- Are there any legal presumptions raised by an acceptance—if so, what?
- 9-§49. Who is the principal debtor on a note?
- 10-§50. What is admitted by the maker of a note?
- 11-§51. What is the liability of an acceptor *supra* protest?

- 12- By what is such an acceptor bound?
- 13-§52. What is the liability of a transferror by delivery?
- 14- What are his warranties?
- 15- What is his liability, and when, if paper fails in any of the warranties?
- 16-§53. What is the effect of the contract of indorsement?
- 17- What law governs the indorsement?
- 18- What effect has the writing, by a transferror, of his name on the back of an instrument payable to bearer?
- 19- What contracts are implied by an unqualified indorsement?
- 20- How does an indorsement "without recourse" differ from this?
- 21-§54. Is the obligation of a surety and indorser the same?
- 22- If you say they are different state the obligation of each.
- 23-§55. What is the effect of a qualified indorsement?
- 24- What would be the effect of using words of assignment in making a transfer?
- 25- When will this be considered a qualified indorsement?
- 26- What would be the effect of making an indorsement in the form of a guaranty?
- 27-§56. What effect has the indorsement of a non-negotiable instrument?
- 28- May such an indorsement be a guaranty—if so, when?
- 29-§57. Is the liability of a transferror by delivery, any different from that of a transferror by indorsement? State to whom the liability of each exists.
- 30- State the warranties of the indorser to a bona fide holder.
- 31- What is the agreement implied by indorsement—and why?
- 32- When—and up to what time—are drawers and indorsers only conditional debtors?
- 33-§58. State the order of liability of indorsers.
- 34- When and how may this order of liability be altered.

- 35- State the effect of an agreement altering the order of liability.
- 36-§59. May an indorser's liability be qualified—if so, how?
- 37-(a) Who would be affected by such qualification if it is made by a separate contemporaneous agreement?
- 38-(b) Does the general rule governing proof of written contract apply to negotiable instruments?
- 39- State the rule governing proof of written instruments.
- 40- How far does such rule affect the contract of indorsement?
- 41- What is the weight of authority on this point?
- 42- What cannot be shown by parol evidence?
- 43- For what purposes may parol evidence be introduced?
- 44-§60. Define the relation and the liabilities of irregular indorsers.
- 45- What may, and what may not, be proven by parol evidence as affecting such indorsers?
- 46-§61. Does a broker or agent ever assume any liability—if so, what and how?—state fully.

LESSON 13.—

CHAPTER VII.

MATURITY.

§62. In General.

63. When Certain Forms Mature.

64. Maturity of Certain Instruments.

§62. **In General.**—The question as to the time of the maturity of commercial paper arises principally when determining whether an action thereon has been prematurely brought; whether an action is barred by the statute of limitations; whether paper was duly presented for payment, and notice of dishonor given at the proper time; whether protest was made prematurely or was too late; whether an instrument was transferred before its maturity so as to make the holder a bona fide purchaser or otherwise; and whether a bill was prematurely paid by an accommodation acceptor or surety. Substantially the same legal principles govern the question of maturity in all cases but maturity is determined by the law of the place where the instrument is payable.

A bill or note in terms payable on a fixed day or in a specified number of days, months or years after its date, becomes due on that day. Tender of payment on a later day, without interest, is not sufficient, and a tender before such day is premature.

§63. **When Certain Forms Mature.**—If an instrument be payable “on or before” a stated date, the maker has the option to pay it before the time so fixed, if he chooses. It is sometimes a valuable privilege to do this in the saving of interest where the amount involved is large, or when the paying of the indebtedness may help other business transactions. While paper so drawn may be paid at any time after its date still it does not mature and payment cannot be compelled until the expiration of the stated time. The same is true if paper reads “by,” or “on or by” a certain time or date. If made payable “on or after” a fixed date, it is due any time on demand after that date but not before.

An instrument is deemed payable on demand when it is so expressed, or if it reads “when demanded” or “after date,” or “on demand after date” or “at sight” or “on presentation” or words of similar import. The fact that such

an instrument contains a provision for interest makes it none the less payable on demand.¹

This rule as to maturity applies generally where no certain time of payment is expressed in the paper. In some cases it has been held that paper payable on demand is not overdue, so as to affect its transfer, making one a purchaser or transferee after maturity, until a demand of payment has actually been made. The weight of opinion however inclines to the rule that such an instrument is not overdue for the purposes of transfer until after the lapse of a reasonable time, irrespective of whether a demand has been made or not.² What is a reasonable time must be determined upon the facts of each particular case.

§64. Maturity of Certain Instruments. — As has been stated a check unless otherwise expressed therein, or is post-dated, is payable immediately, on or after its date. A check however is not overdue, as affecting its transfer, unless there has been an unreasonable delay in presenting it so that the check becomes what is termed a stale check. The rule as to determining what is a reasonable time applying to other forms of commercial paper, and which have already been stated, pertains also to checks.

A certificate of deposit is subject substantially to the same rules as a promissory note. They are usually payable on demand, and are so payable when no time is expressed therein.³

If an instrument be payable in installments at fixed times, each installment becomes due at the time specified, and in the absence of an express provision in the instrument, an action will lie only for the installments which may at any time become or be due.

An instrument payable on the happening of a contingency or the performance of a condition, will become due for all purposes on the performance of the condition or the happening of the contingency.

An instrument though payable at a fixed time may contain a provision that will cause it to mature earlier. For instance, the provision that the paper may become due at the option of the person holding it in the event of some

¹ Shaw v. Shaw, 43 N. H., 170.

Neb., 494.

² Kirkwood First Nat'l Bank, 40

³ Beardsley v. Webber, 104 Mich., 88.

default of the payor, other than in the payment of the principal—as in the case of a default in the payment of an installment, or of interest, or in a note payable in installments that the whole amount shall become due and payable on default of payment of any of the installments. ⁴ In cases of this character such default also renders the paper due as respects indorsers and guarantors thereon.

Where such option exists the right may be waived or lost by an unreasonable delay in exercising it, by an agreement with the maker, extending the time of payment, or by accepting payment after default. ⁵

So in a deed of trust or mortgage securing notes payable at different times, a provision that none of them shall become due until the maturity of the last would, so far as the enforcement by law is concerned, postpone the maturity of all of the notes until that time.

If a note be payable with interest, such interest does not become due until the note is due. If interest be payable annually, with the option on the part of the holder of the instrument to make it a part of the principal in case of default, no right of action accrues thereon, until the principal becomes due. If however, interest be due at stated periods without further provision affecting it, it is due at such fixed times without regard to the maturity of the principal debt, although the holder may wait until the principal becomes due before demanding payment or suing therefor and no rights will be lost to him thereby. ⁶

⁴ Heath v. Arhey, 96 Ga., 438.

⁵ Meson v. Luce, 116 Cal., 236.

⁶ Nat'l Bank of North America v. Kirby, 108 Mass., 497.

CHAPTER VIII.

PRESENTMENT.

- §65. Necessity of Presentment.
- 66. Presentment for Acceptance Only, Insufficient.
- 67. Presentment to Maker.
- 68. As to Guarantors.
- 69. Presentment of Collateral Paper.
- 70. Who Should Make Presentment
- 71. To Whom Presentment Should Be Made.
- 72. Methods of Presentment.
- 73. Place of Presentment.
- 74. Time of Presentment.
- 75. Reckoning of Time.
- 76. Hour of Presentment.
- 77. Effect of Failure to Present.
- 78. Personal Presentment.
- 79. Presentment at Address of Bill.

§65. **Necessity for Presentment.**—In order to fix the liability of the drawer of a bill, the indorser of a note, or the acceptor of a bill for honor, it is necessary to show that legal presentment of the bill or note, and demand for payment, was made by the holder to the drawee or maker, or that there was the exercise of due diligence for the purpose of obtaining payment.¹ Presentment for payment, in the legal sense, includes a demand for its payment.

§66. **Presentment for Acceptance Only, Insufficient.**—Where a bill has been presented for acceptance and was duly accepted it does not obviate the necessity of its being presented for payment according to its terms. If a holder neglects so to do he loses his remedy upon the bill. However, where a bill has been presented for acceptance and been dishonored, there is no necessity of its presentment for payment, except in the case of a bill that has been afterwards accepted supra protest.²

§67. **Presentment to Maker.**—No presentment for payment is necessary to charge the maker of a note, or the acceptor of a bill. In the case of a note payable on demand it has been held that the commencement of a suit thereon without any other form of presentment is a sufficient demand.³

§68. **As to Guarantors.**—There is some conflict of decision as to whether it is necessary to present paper for

¹ Harvey v. Girard Bank, 119 Pa. St., 212.

² Adams v. Darby, 28 Mo., 162.

³ Bell v. Sackett, 28 Cal., 409.

payment to the maker or acceptor, in order to charge a guarantor. Some jurisdictions seem to hold that the contract of guaranty is an absolute unconditional contract, and so makes a guarantor liable, in case of the default of the principal debtor, without the necessity of proving a demand upon the latter for payment.⁴ If, however, a guarantor restrict his undertaking a different rule applies, and in such a case presentment becomes necessary. However where it appears that a guarantor suffered damage by reason of the failure of the holder to make a presentment to the principal debtor, he would be discharged to the extent of such damage.⁵

§69. **Presentment of Collateral Paper.**—Where a bill drawn on a third person be received in full satisfaction of a debt when paid; or a note is endorsed to a holder as conditional payment of a debt; the person so receiving it assumes the duty of its presentment to the maker or acceptor for payment. His failure to do so not only wipes out his remedy on the paper, but also the debt for which it was given. So, also, where paper is transferred so that the proceeds may be collected and applied on a debt, such presentment and demand is required of the transferee, and if he be guilty of laches in this regard, he must sustain the loss.⁶

§70. **Who Should Make Presentment.**—Notes and inland bills of exchange are presented by the holder or his agent. A demand by a notary public as agent is sufficient. There is no need of a power of attorney or other written instrument to prove agency for that purpose.⁷ The personal representative of a deceased party may make the presentment, and where a holder has become bankrupt or insolvent, presentment should be made by the trustee or assignee in the insolvency proceedings.

In the case of a foreign bill, however, presentment should be made by a notary public personally. Presentment by his clerk or agent will not be sufficient.⁸

§71. **To Whom Presentment Should Be Made.**—Presentment for payment should be made to the acceptor of a bill, or to the maker of a note, or to the authorized agent of

⁴ Baker v. Kelly, 41 Miss., 704. See, contra, Newton Wagon Co. v. Diers, 10 Neb., 288.

⁵ Burrows v. Zapp, 69 Tex., 474.

⁶ Minehart v. Handlin, 37 Ark., 282.

⁷ Seaver v. Lincoln, 38 Mass., 269.

⁸ Commercial Bank v. Barksdale, 36 Mo., 563.

either.⁹ Should the maker of the note, or the drawer of the bill, be deceased at the time of the maturity of the paper, presentment should be made to the personal representative of the deceased if there be one, and if there be none, it should be made at the former dwelling place, or the place of business of the deceased.¹⁰

Where there are two or more makers who are not partners, whether the liability be joint or several, it is necessary that presentment be made to each in order to charge the drawer or indorser.¹¹ Where, however, there are two or more makers or acceptors of a bill of exchange, who are partners, presentment to one of them will be sufficient. This is so even should the firm be subsequently dissolved, since it will still be considered a partnership as to all antecedent transactions.¹² In the case however of one partner dying before the maturity of the instrument, presentment should be made to the surviving partner, and not to the personal representative of the deceased partner.¹³

§72. Method of Presentment.—For a valid presentment and demand to be made, the person doing so must have the bill or note in his possession, unless special circumstances such as its loss or destruction are shown to excuse its absence.¹⁴ The reason for this requirement is that the acceptor or the maker may judge of the genuineness of the paper, payment of which is demanded, and of the right of the holder to receive payment; as well, too, that the payee may obtain immediate possession of it upon paying it. Where paper is destroyed or lost, the presentment of a copy with an offer of indemnity against the original, is sufficient. The demand for payment must be according to the terms of the instrument. A demand therefore for payment in a special kind of currency, as of gold, unless it is so specified in the instrument, is not warranted.¹⁵

§73. Place of Presentment.—A bill or note payable at a designated place must in order to discharge the drawer or indorser, be presented for payment at that place.¹⁶ If it be made payable in a city or town, without designating any

⁹ Brown v. Turner, 15 Ala., 832.

¹⁰ Philpott v. Bryant, 14 E. C. L., 288.

¹¹ Benedict v. Schmieg, 13 Wash., 476.

¹² Gates v. Beecher, 60 N. Y., 522.

¹³ Barlow v. Coggan, 1 Wash. Ter., 257.

¹⁴ Waring v. Betts, 90 Va., 51.

¹⁵ Langenberger v. Kroeger, 48 Cal., 148.

¹⁶ Cox v. National Bank, 100 U. S., 704.

in his possession ready to receive payment. If the maker anywhere in the specified place on that day with the paper particular place therein, it will be sufficient if the holder be or acceptor however has a place of business or residence in the designated place it must be there presented.¹⁷

Presentment and demand for payment at the place named in the instrument is an essential part of the contract so far as indorsers are concerned, and it is important as well even as to the maker. There can be no substitute for this necessity. Even previous notice that the paper will be presented elsewhere, cannot take the place of such presentment.¹⁸

When payable at a designated place, such as at a particular bank, formal demand there is not necessary. Hence if such a bill or note is proved to be at the designated place on the date of its maturity, ready to be given up if paid, it will be deemed a sufficient demand.¹⁹ The mere physical presence at such place of the instrument, however, without the bank having knowledge of that fact, is insufficient. For instance, where a letter containing a bill of exchange was laid down, with other papers on a desk in the office of an official of the bank, and it disappeared without his having ever seen it, the court held that there was no sufficient presentment and demand.²⁰

When the place of payment is specially designated in the acceptance of a bill, it must be presented at that place in order to make the drawer or the indorser liable, even though the bill be addressed to a different place.²¹ This however is with the proviso that the designation of the place of payment in the acceptance be not of such a character as to alter or change the tenor of the instrument.²²

The weight of authority in the United States is that the designation of a place of payment in a note does not make it incumbent, as a condition precedent to create an obligation by the maker of the note, that it should be presented at that particular place for payment.

If no place of payment be named in an instrument then it must be presented for payment at the usual and principal

¹⁷ Meyer v. Hibsher, 47 N. Y., 265.

¹⁸ Parker v. Stroud, 98 N. Y., 383.

¹⁹ People's Bank v. Brooks, 31 Md., 7.

²⁰ Chicopee Bank v. Philadelphia Bank, 75 U. S., 641.

²¹ Troy City Bank v. Lauman, 19 N. Y., 477.

²² Niagara Bank v. Fairman, 31 Barb. (N. Y.), 403.

place of business of the maker, or the acceptor, during business hours; or if he has no established place of business, then at his residence, during reasonable waking hours.

§74. **Time of Presentment.**—Where an instrument is payable on a day certain, in order to legally charge the drawer or the indorser, it should be presented on the day of its maturity during reasonable hours. Presentment a day before,²³ or a day after,²⁴ maturity is not sufficient.

When no certain day is specified an instrument should be presented within a reasonable time after its date. What is a reasonable time must be judged in all cases from the circumstances of the case and the situation of the parties. This rule also applies to sight drafts. It is impracticable to lay down any specific rule by which the question of what is a reasonable time can be measured in every case. In the event of a bill or note being indorsed after maturity it is as if a new bill were drawn payable at sight, and therefore to charge the indorser, presentment should be made within a reasonable time. The same rule as to what is a reasonable time applies in such instances as in the case of other paper payable on no specified day.²⁵ However, where an instrument is transmitted by mail for payment and is by mistake of the postal authorities delayed, such as the misdirection of a package of mail matter by a postmaster—such delay will be excused;²⁶ but in all such cases presentment must be made within a reasonable time thereafter.²⁷

§75. **Reckoning of Time.**—The day of the date or of the sight of paper is to be excluded in reckoning time when a bill or note is made due a certain number of days after its date, or after sight.²⁸ If it be due on a Sunday or legal holiday, presentment should be made on the day preceding.²⁹ In the states where the legislature has provided for a Saturday half holiday, presentment may be made up to noon of that day, or subsequently, as may be provided by statute.³⁰

A month, according to the custom of merchants, is a calendar month, and not a lunar month. So, when an instrument is dated on a day in any month and payable in a speci-

²³ Robinson v. Blen, 20 Me., 109.

²⁴ Davis v. Herrick, 6 Ohio, 75.

²⁵ Union Bank v. Ezell, 10 Hump. (Tenn.), 385.

²⁶ Windham Bank v. Norton, 22

Conn., 401.

²⁷ Durden v. Smith, 44 Miss., 548.

²⁸ Henry v. Jones, 8 Mass., 452.

²⁹ Barlow v. Gregory, 31 Conn., 261.

³⁰ Sylvester v. Crohan, 138 N. Y., 494.

fied number of months from that date, it becomes due on the same day of the month in the stipulated number of months afterward,³¹ irrespective of the number of days in the intervening months. A note that would, under this rule, become due on the 29th, 30th or 31st of February, because dated on a corresponding date in some preceding month and made payable a stated number of months thereafter, will be due on February 28th, except in leap years when it will mature on the 29th.

Where however a bill or note is undated the time of maturity will be reckoned from the date of its delivery, that being then presumed to be the date of its execution.

§76. **Hour of Presentment.**—Where an instrument is made payable at a bank it should be presented during the usual business hours of the bank, and paper payable at a place of business should be presented during usual business hours of such business. If paper is to be presented at the payor's residence it may, as already stated, be presented at any time of the day down to the ordinary hours of rest in the evening.³²

§77. **Effect of Failure to Present.**—The effect of a failure to make such presentment would not be to relieve a maker from his promise to pay as agreed, but only to relieve him from damages resulting from such failure, if he was ready at the appointed time and place to pay his obligation and there was no one there to receive the money. A plea of this fact in a suit upon an instrument, and payment into court of the amount due thereon, will be a bar to a recovery from him of interest and costs, but it will be no bar to the cause of action itself.³³ It has however been held that where a note is made payable at a bank and no presentment was duly made, if the maker sustain damage thereby he is relieved from all liability.³⁴

How far this would apply to demand notes depends upon the law of the jurisdiction in which the question arises, as there is a wide divergence of judicial opinion as affecting paper of this class.

The parties may agree orally upon the place of payment

³¹ *McMurchey v. Robinson*, 10 Ohio, 496.

³³ *Montgomery v. Tutt*, 11 Cal., 317.

³⁴ *Lazier v. Horan*, 55 Iowa, 75.

³² *Farnsworth v. Allen*, 4 Gray, 435.

where no such place is mentioned in an instrument, and the effect of this would be to make a demand for payment at that place sufficient to bind a drawer or indorser.³⁵ Where no place of payment be designated or agreed upon, demand should be made on the acceptor, or the drawer as the case may be, at his residence or place of business, to charge the drawer or indorser, and where such party has no place of business, it should be made at his residence.³⁶

In order to be deemed a place of business it must not be a place used temporarily by the person for the transaction of some particular business, but his regular and known place of business for the conducting of money transactions; though an office where one receives business callers and where it appears that he had no other known place of business would be a proper place for the making of a demand.³⁷

§78. **Personal Presentment.**—If presentment be made on a party in person, and no objection is made to the place where such presentment was made, and there be a refusal to pay, it will be deemed a sufficient presentment.³⁸

§79. **Presentment at Address of Bill.**—Where a bill is addressed to a drawee at a particular place, and accepted generally by him, such address indicates where it is to be presented for payment. A presentment for payment at such place is sufficient as against the drawer or indorsers.³⁹

CHAPTER IX.

DISCHARGE AND PAYMENT.

- §80. Payment as Discharge.
- 81. Appropriation of Payments.
- 82. Time of Payment.
- 83. Payment to Whom Made.
- 84. Payment by Whom Made.
- 85. Payment for Honor—Supra Protest.
- 86. Right to Reissue Paid Paper.
- 87. Payment by mistake.
- 88. Discharge Other Than by Payment.
- 89. Discharge of Indorsers.
- 90. Payment by Check.

§80. **Payment as Discharge.**—A negotiable instrument

³⁵ Pearson v. Bank of Metropolis, 26 U. S., 89.

³⁶ Miltenberger v. Spaulding, 33 Mo., 421; and see Ante §.

³⁷ West v. Brown, 6 Ohio St., 542.

³⁸ Parker v. Kellogg, 158 Mass., 112.

³⁹ Farnsworth v. Mullen, 164 Mass., 112.

is discharged when the right of action thereon is extinguished; that is to say when the instrument is paid or all legal liability thereon is otherwise released or discharged. One of several parties to an instrument may be discharged and the others still be liable.

Payment is the performance of the contract with the intention of extinguishing the liability of the party paying, or of the one for whom the payment is made. Payment always extinguishes the liability of the party paying, but whether it has a similar effect as to the contract itself, depends upon whether such payment fulfills all the obligations of the contract. If it does, the contract is extinguished; otherwise if it does not.

§81. **Appropriation of Payments.**—Where one is indebted to another on two or more instruments or accounts, and payment is made in an amount insufficient to satisfy all of them, and the payment is voluntary and not under stress of legal process, the debtor has the right to appropriate the money paid to whatever account he pleases. He may do this even though it be to the prejudice of a party who is security for one of the unpaid debts. As between a debtor and a creditor, the debtor has the right to say to what debts of his, payments shall be credited, up to the time suit is brought on an instrument. As to third parties, such as indorsers, sureties and the like, such appropriation must be made by him within a reasonable time.¹ If a debtor makes no appropriation of his payments the creditor may apply same as he pleases to the various accounts held by him. A creditor however cannot apply a payment to a debt not yet due, if he holds an obligation of the debtor already due. In order to make an appropriation of payments it is not necessary for the debtor to make an express declaration thereof to the creditor; but any facts or circumstances showing an intention to make an appropriation to cover certain indebtedness, will be binding on the creditor.²

§82. **Time of Payment.**—To operate as a discharge of commercial paper a payment must be made in due course, and it must be made in good faith and without notice that the title of the holder to the paper is defective. Payment made before maturity and without a surrender of the in-

¹ Green v. Ford, 79 Ga., 130.

² Taylor v. Sandiford, 20 U. S., 13.

strument, will be valid between the original parties to the paper but will be no defense to the payer as against a bona fide holder who took the instrument for value before maturity.³

When payment is made the instrument should be taken up by the payor. If a receipt merely for the money, or other evidence of payment, is taken instead of the paper itself, and the latter should later turn up in the hands of a bona fide holder before maturity, the debtor would not be protected by the possession of the receipt.

§83. **Payment to Whom Made.**—In order to discharge a debt the payment must be made to the holder of the instrument or to some person authorized by him to receive it.

Where an instrument is payable to order, or is indorsed in full—that is to a named indorsee—payment to the payee or indorsee in possession of the paper is valid. But possession of the instrument in such a case by one other than the named indorsee is no evidence of his authority to receive payment, and if such person is not in fact authorized to receive payment, the payor will not be discharged.⁴ Where however an instrument is indorsed in blank or is payable to bearer, the person in possession of the instrument will be entitled to receive payment thereof. Accordingly if payment is made to such holder in good faith it will be valid, although it subsequently appear that he had no right to the instrument or to receive the money due thereon.⁵

The taking up of a note by an indorser in the hands of a bona fide holder for value before maturity makes him legally a purchaser from such holder and he succeeds to his legal rights on the paper. When paid by an indorser after maturity, such payment does not extinguish the debt, but the indorser has the right of recovery thereon against the maker, or the prior indorsers, and is entitled to be subrogated to any collateral security held by them for the payment of the instrument.⁶

Payment to a payee should only be made before indorsement and transfer of the paper by him. If the maker of a note pays it to the payee after his indorsement and transfer

³ Gosling v. Griffin, 85 Tenn., 737.

⁵ Stoddard v. Burton, 41 Iowa, 582.

⁴ Doubleday v. Kress, 50 N. Y., 410.

⁶ Tilford v. Garrells, 132 Ill., 557.

thereof, or after notice of such an assignment or transfer, either before or after maturity, and does it without obtaining the note, it will not avail him as against the transferee and holder of the note.⁷

§84. **Payment by Whom Made.**—Any one liable on an instrument may discharge his liability to the holder by paying it; and payment at its maturity by the party ultimately liable thereon, i. e., the maker—or in case of an accepted bill of exchange, the acceptor—discharges the instrument. So, too, would payment by one of several joint makers or acceptors.

Except in the case of accommodation paper payment by the drawer of a bill or by an indorser does not discharge the instrument. In such excepted cases the one who so pays is remitted to his former rights against the antecedent parties on the paper, and is subrogated to the benefit of any securities to which the holder who has so been paid is entitled against such antecedent parties. Even should an endorser make a payment it would not affect the maker's liability on the instrument, and notwithstanding such payment the holder may still recover the whole amount of the instrument from the maker, being then accountable for its amount to the one making such partial payment.⁸

§85. **Payment for Honor—Supra Protest.**—Any person may intervene and pay a bill of exchange for the honor of a party liable thereon, where it has been protested for non-payment; and this he may do without any request from the one from whom he pays.⁹ As was stated in a previous lesson,¹⁰ such payment should be certified before a notary public, and a declaration for whom the payment is made should be recorded by the notary either in the protest of the paper or on a separate instrument, and the parties concerned should be duly notified. Such payment is usually termed an act of honor of the paper, and the person so honoring it succeeds to the title and rights thereon of the person for whom he so pays and from whom he thus receives it. Such payment of an instrument discharges all parties thereto, subsequent to the one for whose honor it has been

⁷ Cox v. Cayan, 117 Mich., 599.

⁹ Wood v. Pugh, 7 Ohio, 164.

⁸ Madison Square Bank v. Pierce, ¹⁰ See §21 Ante.

137 N. Y., 444.

taken up.¹¹ The doctrine of *supra* protest, or that allowing payment for honor — has no applicability to promissory notes. Hence the payment of a note by one not a party thereto, without the request so to do by one who is a party thereto, gives that person so paying no legal right because of such payment to force payment from any of the prior parties.¹²

§86. **Right to Reissue Paid Paper.**—Payment of paper at maturity by the maker or acceptor discharges the instrument and it cannot thereafter be reissued. But where a bill is paid at maturity by the drawer thereof, if it was payable to his own order and he is accordingly the payee as well as the drawee, it may be reissued by him. If a bill is payable to the order of a third person it cannot be reissued. An indorser however who pays a bill or note at or after maturity may reissue it and give his indorsee a right of action thereon against the prior parties. If an instrument is paid or taken up before its maturity by the drawer or the indorser, the payor may reissue and further negotiate it.¹³

§87. **Payment under Mistake.**—Payment made under a mistake of material facts may be recovered back. Hence money paid on a forged, canceled or altered instrument, or paid upon an instrument by mistake to one who has no right to demand it, may be recovered back.¹⁴ If however after discovering the mistake, the payor be guilty of laches—i. e., of negligence in taking advantage of his rights—so that the position of the other party is changed to his damage, he loses his rights to recover. Negligence of itself will not defeat recovery; but where negligence exists, and if a recovery were permitted loss would be thrown upon an innocent party, the negligence will be a bar to such recovery by the one guilty of such negligence.

§88. **Discharge Other than by Payment.**—There may be a discharge of commercial instruments by the same means, other than by fulfillment thereof, as will discharge any other form of contract. Novation, accord and satisfaction, release of an obligor, such as an acceptor or maker, by

¹¹ McDowell v. Cook, 45 Am. Dec., 289.

¹² Smith v. Sawyer, 55 Me., 139.

¹³ West Boston Savings Bank v

Thompson, 124 Mass., 514.

¹⁴ Talbot v. National Bank, 129 Mass., 67.

the holder and the like. No agreement of any character between the parties can attach to an instrument however so as to affect the rights of a bona fide holder without notice, who takes it before maturity. So also the cancellation of an instrument by the holder or with his consent, whether by its destruction or by writing or stamping words of cancellation across its face showing intent to cancel, is a discharge. Likewise a material alteration of the terms of an instrument without the consent of all parties liable thereon, will have like effect.

Judgment recovered on a bill or note extinguishes the instrument and discharges the debt thereby witnessed between the parties to the action, making the obligation thereafter to rest upon the judgment and not upon the original indebtedness. But unless the judgment is satisfied and paid the obligation is not extinguished between the plaintiff and the parties to the instrument, prior and subsequent to the defendant, or between the defendant and a party on the paper prior to the plaintiff.

Discharge in bankruptcy or insolvency discharges the liability of the bankrupt or insolvent but does not affect the liability of other parties to an instrument.

§89. **Discharge of Indorsers.**—Unless the actual relation of an indorser on an instrument is proved to be different from that which it appears on the face of the instrument to be, as in the case of accommodation indorsers, each indorser is presumed and held bound to indemnify each subsequent party to the instrument, and has himself the right to be indemnified by each prior party thereto.¹⁵ To this extent there is the relation of suretyship between the parties; the maker or acceptor being the principal debtor, and the drawer and indorsers, in the order in which their names appear, being sureties or guarantors. The same causes that will discharge a surety or a guarantor will therefor discharge an indorser.¹⁶ So that if the holder of an instrument enter into a binding agreement to give time to the acceptor or maker or to a prior indorser, without the consent of the subsequent indorsers, he discharges the subsequent indorsers from liability. It is said however that where in granting

¹⁵ McDonald v. Magruder, 28 U. S., 470. ¹⁶ Smith v. Rice, 27 Mo., 505.

such right the holder expressly reserves his rights against subsequent parties they are not so discharged.¹⁷

Giving time of payment to an indorser however would not discharge prior parties. Such an agreement must be fixed and definite in extent and founded on a legal consideration.¹⁸ But a release of, or a composition with, the acceptor or the prior indorsers, without the consent of subsequent indorsers, releases the latter from liability. The surrender by a holder of any security he may have received from the maker or acceptor, discharges the indorsers to the amount of the security so surrendered. And the release of one joint party to an instrument, discharges all the joint parties. So also where one of several joint parties is, as to the others, a surety, a release or extension of time granted to the principal with knowledge of the relation of the parties, discharges the surety.¹⁹

§90. Payment by Check. — If a person receiving a check presents it with due diligence at the bank on which it is drawn, and it be dishonored, it will not be considered as payment of the debt for which it was given. But laches on the part of the holder of such check, such as a delay for several days in presenting it for payment, will discharge the debt if any damage result to the drawer of the check from the failure of the holder to promptly present same.²⁰ It is not required that a check be presented on the day it is drawn or is received by the payee, but it should be presented or put in course of collection not later than the day after it is received.

¹⁷ Hagey v. Hill, 75 Pa. St., 108.

¹⁸ Brooks v. Allen, 62 Ind., 403.

¹⁹ Irvine v. Adams, 48 Wis., 468.

²⁰ Hamilton v. Winona Lumber Co.,
95 Mich., 436.

QUIZZER.

MATURITY.

- 1-§62. In what instances does the question of the time of the maturity of commercial paper usually arise?
- 2- The law of what place governs the question of maturity?
- 3- When does an instrument payable on a fixed day, or at a stated time after a fixed date, mature?

- 4-§63. What option—and in whose behalf—applies to paper payable “on or before” a fixed date?
- 5- Of what practical service is such an option?
- 6- When does paper so drawn mature?
- 7- Give illustrations of other forms of maturity having the same effect.
- 8- When is paper payable “on or after” a stated date, due?
- 9- Name several forms, the use of which make paper due on demand.
- 10- Does a provision in an instrument for the payment of interest affect its maturity?
- 11- When is paper payable on demand “overdue” so as to affect its transfer?
- 12- What determines the question of “reasonable time” in fixing the maturity of demand paper?
- 13-§64. When does a check mature?
- 14- When is a check “overdue” so as to affect its transfer?
- 15- What are “overdue” checks called?
- 16- By what rule is the question of reasonable time in the presentment of checks determined?
- 17- When do certificates of deposit mature—and what rules govern that matter?
- 18- What can you say as to the question of maturity of installment notes?
- 19- When will instruments payable upon the happening of a stated contingency mature?
- 20- State fully the rule governing the maturity of instruments due on a fixed date but containing provisions giving the holders the option to declare them due earlier upon certain defaults — illustrate.
- 21- Can such an option be waived or lost—if so, in what ways?
- 22- When will a series of notes due at different dates, but secured by a mortgage which provides that none of them shall be payable until the maturity of the last one, mature?
- 23- When does interest on an interest-bearing note become due?

- 24- When does a right of action accrue on a note bearing interest payable annually, with option to holder to make it a part of the principal if unpaid when due?
- 25- Is this changed where interest is due at stated periods without further provision affecting it—if so, in what way?

PRESENTMENT

- 1-§65. What is necessary to be shown in order to fix the liability of the drawer of a bill?
- 2- Does this apply to any others—if so, to whom?
- 3- What does “presentment” in the legal sense include?
- 4-§66. When a bill is presented for acceptance and accepted, is there need for any further presentment at maturity—if so, what?
- 5- Would the fact that the bill was discharged when presented for acceptance alter the case—if so, how?
- 6- Is there any exception to this rule—if so, what?
- 7-§67. Is presentment necessary to charge a maker or acceptor?
- 8- When is the beginning of a suit said to be a sufficient demand?
- 9-§68. What do you understand to be the rule as to guarantors? Answer fully, and give reasons.
- 10-§69. In the case of an instrument being given in satisfaction of a debt, what is the duty of the person receiving it and what would be the result of his failure to act?
- 11- What is required of one who receives an instrument, the proceeds of which are to be applied on a debt, and what penalty would be incurred from his failure to act?
- 12-§70. Who may present a note or inland bill?
- 13- Is a power of attorney necessary for this purpose?
- 14- Where a party holding paper be deceased when it is due, who may present?
- 15- Who may present when the party be insolvent or bankrupt?

- 16- Who should present a foreign bill?
- 17- Would presentment by a clerk be sufficient?
- 18-§71. To whom should the instrument be presented?
- 19- If the payor be deceased, to whom must presentment be made?
- 20- If there be several makers not partners, to whom should presentment be made?
- 21- If the liability be joint what difference would this make?
- 22- If they were partners what would be sufficient presentment?
- 23- If the firm had in the meantime been dissolved, what presentment would be required in order to be sufficient?
- 24- If a partner died before the maturity of the instrument, to whom should it be presented?
- 25-§72. Is possession of the instrument necessary in order to make a valid presentment? Give reason for answer.
- 26- In case of the loss or destruction of the instrument what would be a sufficient presentment?
- 27- Is payment in a special kind of currency necessary—if so, when?
- 28-§73. What is the rule where a paper is made payable in a city without designating a particular place?
- 29- Is there any difference if the party has a residence or place of business therein—if so, what?
- 30- Is demand for payment at the place named essential?
- 31- Who, if anyone, is affected?
- 32- Can there be a substitute for it, or will previous notice be sufficient?
- 33- If payable at a particular bank is formal demand necessary?
- 34- What will be deemed a sufficient demand in such a case?
- 35- If the instrument is in the bank without the knowledge of the bank's officers will that be deemed a sufficient presentment?
- 36- If the place of payment be designated in the acceptance where should the bill be presented?

- 37- Would this control if the bill were addressed to a different place?
- 38- Is there any proviso regarding this, or is it absolute—give reason for answer?
- 39-§74. When an instrument is payable on a fixed day when should it be presented?
- 40- Would presentation the day before, or after, be sufficient?
- 41- What is the rule when no day be specified?
- 42- What is the effect of indorsement after maturity?
- 43- When should presentment be made in such a case?
- 44- If a paper be transmitted by mail and delay is caused by the postal authorities, what is the effect?
- 45- What is the rule as to presentment in such cases?
- 46-§75. How is time reckoned in determining the maturity of commercial paper?
- 47- Do we figure in these cases by lunar or calendar months?
- 48- What determines the date for the purpose of fixing maturity when an instrument is undated?
- 49- When will paper maturing by its terms on February 29th, 30th or 31st be payable?
- 50-§76. At what hour must presentment be made if payable at a bank?
- 51- When, if payable at a place of business, and when if payable at a residence?
- 52-§77. What, as regards the liability of the maker, is the result of failing to make presentment?
- 53- Would the fact that the failure to present resulted in damage to him affect the result?
- 54- Where no place of payment is mentioned in the paper can a place be agreed on?
- 55- How would such an agreement affect a drawer or indorser?
- 56- Where no place of payment be named or agreed on where should presentment be made?
- 57- What is deemed requisite to make a place of business such as to make a presentment thereat sufficient?
- 58-§78. What is the rule, as to personal presentment, as to the place of making it?

- 59-§79. If a bill be addressed at a particular place and accepted generally, would this address indicate anything as to the place of presentment?
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DISCHARGE AND PAYMENT.

- 1-§80. When is a negotiable instrument discharged?
- 2- Does the discharge of one party thereto discharge all parties?
- 3- What is meant by payment?
- 4- What is the effect of payment on the liability of the party making it?
- 5- How does it affect the contract itself?
- 6-§81. When has a debtor the right to make an appropriation of his payments to certain of his indebtedness?
- 7- Can he make an appropriation of payment in favor of one debt, and in prejudice of a party who is security on another debt?
- 8- Until when has a debtor the right to make such appropriation?
- 9- What is the rule as to third parties on this matter?
- 10- When may a creditor make appropriation of payments as he desires, upon several debts held by him?
- 11- To what debts must the creditor give preference?
- 12- How may appropriation be expressed by a debtor?
- 13-§82. When does payment operate as a discharge?
- 14- What is the effect of payment of an instrument before its maturity?
- 15- What should be done with an instrument on payment thereof being made?
- 16- Would a receipt for payment of a negotiable instrument protect the payor as evidence of payment of such instrument?
- 17-§83. To whom should payment be made?
- 18- When would payment to a payee or indorsee in possession of paper be deemed valid?
- 19- What would be the effect of payment to a person in possession where the instrument is indorsed in full, or is payable to order?

- 20- Would possession be sufficient to authorize such payment?
- 21- In what case, if any, would payment to a person in possession of an instrument be valid?
- 22- What would make an indorser a bona fide holder?
- 23- What is the effect of payment by an indorser after maturity?
- 24- Does it extinguish the debt?
- 25- Has an indorser, paying an instrument, any right to the collateral security, if any, held by the payee?
- 26- When only should payment be made to a payee?
- 27- How will payment of an instrument affect an indorsee if it is made after indorsement or transfer to him, and without surrender of the paper?
- 28-§84. How may one liable on an instrument obtain his discharge from the holder?
- 29- What will be the effect of payment of paper at its maturity by the one ultimately liable thereon?
- 30- What will be the effect of a payment by one of several joint makers or acceptors?
- 31- When will payment by a drawer or indorser discharge an instrument?
- 32- What is the general rule as to payment by a drawer or indorser?
- 33- Will part payment by an indorser affect the liability of the maker, and what right has a holder in such a case?
- 34- In such a case for what would the maker be liable?
- 35-§85. To what rights does one who pays for honor succeed?
- 36- What is its effect on parties subsequent to the one for whose honor a bill is paid?
- 37- What application has the doctrine of supra protest to promissory notes?
- 38- What rights, if any, does a person who makes such payment acquire in the case of a note?
- 39-§86. What will prevent the reissue of an instrument?
- 40- When may it be reissued by the drawer even if paid at maturity?
- 41- If it were to the order of a third party what effect if any, would it have?

- 42- Has an indorser the right to reissue paid paper and if so, what rights does such reissue confer?
- 43- What effect will payment before maturity have on the right of a drawer or indorser to reissue paper?
- 44-§87. When may payment made under a mistake be recovered?
- 45- What effect will laches in seeking such recovery have, if any?
- 46- Will negligence defeat such recovery?
- 47- When will negligence bar a recovery?
- 48-§88. What methods other than by payment are there of discharging negotiable paper?
- 49- Can an agreement discharging paper attach to an instrument so as to affect the rights of a bona fide holder without notice, before maturity?
- 50- What will be the effect of cancellation of such paper?
- 51- What will be the effect of a material alteration in such paper?
- 52- What is the effect of a judgment in an action upon such paper?
- 53- What is its effect on other parties, not parties to the action, of a judgment rendered thereon?
- 54- What will be the effect of a discharge in bankruptcy on one's liability on such paper?
- 55- What will have a similar effect?
- 56-§89. What relation have indorsers to one another?
- 57- Is this likewise true of accommodation indorsers?
- 58- Is there any relation of suretyship in the engagement of an indorser—if so, what is it?
- 59- What will discharge an indorser?
- 60- Can such discharge be prevented—if so, how?
- 61- Will the extending of the time of payment to an indorser discharge prior parties on commercial paper?
- 62- When will a release, or a composition with an acceptor or prior endorsers, release subsequent indorsers?
- 63- What will be the effect on indorsers of the surrender of security given the payee for the debt?

- 64- What will be the effect on indorsers of the release of a joint party?
- 65- Where one of several joint parties is, as to the other, a surety, what effect will a release or extension of time to the principal debtor, with knowledge of the relation, have as to him?
- 66-§90. When will the receipt of a check that is dishonored, not be considered payment?
- 67- What will discharge the debt, even if the check were dishonored?
- 68- When should a check be presented?
- 69- Is presentment on the day it is made, or is received by the payee, necessary—if not, what will suffice?

LESSON 14.—

CHAPTER X.

PROTEST

- §91. Definition.
- 92. Formalities.
- 93. When and by Whom Made.
- 94. Protest Certificate as Evidence.
- 95. Protest as Notice of Dishonor.
- 96. Protest Not Evidence of Collateral Facts.
- 97. Lost Certificate of Protest.
- 98. Notarial Fees.

§91. **Definition.**—Protest in its general sense refers to and includes all the steps legally necessary to charge an drawer or indorser on commercial paper. (It is indispensable in the case of a foreign bill of exchange.¹) (The protest may be either for non-acceptance or non-payment.) (It has been held that protest is unnecessary in the case of inland bills of exchange and promissory notes.²)

Protest may be defined as a solemn declaration in writing, in due form, by a notary public, usually under his notarial seal, or if not by a notary by some responsible unofficial person, on behalf of the holder of a bill or note, protesting against all parties for any loss or damages by the non-acceptance or non-payment, as the case may be, of the bill or note.

§92. **Formalities.**—(The formalities of protest apply without qualification, and a strict conformity thereto is necessary to a valid protest.) The certificate of protest should identify or designate the instrument to which it refers. This is usually done by affixing the instrument protest or writing in a copy of it. It must set forth the fact of the presentation of the paper for acceptance, or for payment. (A protest setting forth a demand of payment, and saying nothing of presentment of the paper, is defective on its face.³)

(There should also be a statement as to the party to whom it was presented, and the one to whom it was made.) (The time and place of presentment must also be stated together with a statement of the additional fact of a demand for acceptance or for payment.) (The fact of a refusal of

¹ Ticonic Bank v. Stackpole, 41 Mo., 302.

² Green v. Louthain, 49 Ind., 139.

³ Musson v. Lake, 45 U. S., 262.

acceptance or of payment must also be set forth; and the certificate of protest should be signed by the notary making it. (While according to some authorities the seal of the notary is not requisite, it is advisable that it should be affixed to the certificate.)

§93. **When and By Whom Made.**—A protest should be made on the day of the presentment or demand, and should be made at the place where the refusal of acceptance or of payment takes place. It should be made by a notary personally. He cannot depute another to do it. Where however no notary can be found, protest may be made by any respectable or substantial citizen of the place.⁴

§94. **Protest Certificate as Evidence.**—The certificate of protest is prima facie evidence of its own authority and execution. It will be received as evidence of the truth of the facts set forth therein within the scope of the official duty of the notary,⁵ and is prima facie evidence of the dishonor of the instrument therein described.

In most states notarial protest of inland bills and promissory notes is by statute also made prima facie evidence of the same facts as in the case of foreign bills.

A notary upon being called as a witness may use the certificate of protest to refresh his memory, and the protest itself has been held admissible in evidence to prove the facts set forth in it.⁶

§95. **Protest as Notice of Dishonor.**—The usual practice is to embody in the certificate of protest a statement as to notice of dishonor, although in some states it may be done by a separate certificate. The certificate being evidence only of such facts as may be stated therein, it will not be notice of dishonor unless it be stated therein that such notice was given.⁷ In such cases it should also contain a statement as to the manner of giving the notice, as well as the time and place when such notice was given. It is not necessary to set forth the contents of the notice, nor by whom the notice was given—where it makes the positive

⁴ Todd v. Neal, 49 Ala., 266.

⁵ Pierce v. Idseth, 106 U. S., 546.

⁶ Martin v. Smith, 66 N. W. Rep., 61.

⁷ Thorp v. Craig, 10 Iowa, 461.

statement that such notice was given—the presumption being that the notary made the service of notice. ⁸

§96. **Protest not Evidence of Collateral Facts.**—The protest will not be received as evidence of facts collateral to and independent of the presentment, refusal and notice. Hence a statement therein that demand was made of “one of the administrators,” would not establish the fact of the death of the acceptor and the granting of letters of administration to the party to whom the notice was given. For the same reason the fact of diligent search and inquiry for the indorser of a note for the purpose of giving notice of dishonor, cannot be proved by a statement contained in a certificate of protest. ⁹

§97. **Lost Certificate of Protest.**—If a certificate of protest be destroyed or lost, proof of the facts it stated, must be made in the usual manner for proving the contents of lost instruments. Independent of statutory enactment prescribing other classes of evidence, the best evidence which the nature of the case permits, such as copies, records or memoranda, and the like, may be introduced to prove the certificate. ¹⁰

§98. **Notarial Fees.**—In all cases where protest is required the notarial fees are a legal charge on the part of the holder, and may be added to the instrument and charged against the party protested. Where however as in the case of an inland bill or promissory note not requiring protest, but whose protest is made for the purpose of evidence of dishonor of the paper, there is some doubt as to whether fees therefor can be recovered. Where there is no indorser, and hence protest would be absolutely useless from a legal standpoint, no protest fees are chargeable against the maker of the paper. So, too, where there is a guarantor of a note, protest being unnecessary to fix his liability, protest fees are not legally recoverable. ¹¹

⁸ *Slaughters v. Farland*, 31 Gratt (Va.), 134.

⁹ *Reier v. Strauss*, 54 Md., 278.

¹⁰ *McGarr v. Lloyd*, 3 Pa. St., 474.

¹¹ *Woolley v. Van Valkenburgh*, 16 Kan., 20.

CHAPTER XI.

NOTICE OF DISHONOR

- §99. Necessity of Notice—Definition.
- 100. To Whom Must Be Given.
- 101. When Must Be Given.
- 102. When Negotiated After Dishonor.
- 103. When Note Payable in Instalments.
- 104. Form of Notice.
- 105. Mode of Giving Notice.
- 106. Misdirected Notice.
- 107. What Will Excuse Protest and Notice.
- 108. Waiver of Notice.
- 109. Proof of Notice.

§99. **Necessity of Notice.**—Notice of dishonor is required to be given to all indorsers and acceptors liable on a dishonored instrument, and the failure to do so discharges the liability of such a party to whom no notice is given. The mere fact that a party charged on commercial paper has knowledge of the dishonor of paper on which he is liable, is not sufficient. He must, in order to lay the legal foundation for holding him to the paper, receive notice in due form and manner of the dishonor.

Due notice is not notice—^or knowledge received in any sort of way—by verbal telling from an outside party, by newspaper items, or even by information received from the maker of the paper itself that he has not paid it—it is notice of the fact of dishonor given by the protesting officer, at the instigation and on behalf of the holder of the paper, that presentment and demand thereof was duly made, payment was refused, and that its dishonor is protested against him—said party so notified—and that he will be held liable to pay said paper. Accordingly where a bill of exchange has been presented for acceptance, or a bill or note has been presented for payment, and been refused, such notice of dishonor must be given in order to hold the drawer or indorser thereon liable.¹ To charge an indorser alone notice to him only is sufficient, and need not necessarily be given to the drawer.

§100. **To Whom Must be Given.**—In the case of successive indorsers a holder, if he so chooses, may give them all notice so as to fix the liability of all. Such notice will inure to the benefit of each party and against those who stand subsequent to him on the paper. A holder however

¹ Long v. Stephenson, 72 N. C. 569.

is not required to give notice to all indorsers in order to fix the liability of any particular indorser receiving notice. He is required to notify only the indorser to whom he looks for payment, although in practice usually all parties to the instrument are duly notified. Therefore the holder's immediate indorser, if he receives regular notice, will not be discharged because the holder did not give notice to a previous indorser.²

The holder of paper is required only to send notice to his immediate indorser who receiving notice should promptly transmit it to his immediate indorser and so on. Each will then be liable to his immediate indorser or to the holder, even though the notice did not reach some as soon as if it had been directly sent them by the holder; the holder having his day in which to notify his indorser and each indorser having the same time to notify his predecessor and so on.

If then an indorser receiving notice, wishes to have a remedy over against a prior indorser, it devolves upon him to give notice to such prior indorser, irrespective of whether the holder has done so or not, and so on through the series of indorsers up to the first.³

§101. **When Must be Given.**—Notice of dishonor must be put in transit to the party to be held thereby, "within a reasonable time" after the dishonor and protest of the paper in order to hold such party. It should be done as soon after protest as is possible in the usual and due course of business, and in any event not later than the day following protest—preferably on the very day of the protest.

Notice if given prior to the dishonor of paper will be void, as there is in such cases no default at the time the notice would thus be given;⁴ and notice if forwarded by mail should, as already suggested, be posted early enough to be sent by mail of the day succeeding the dishonor.⁵ Sundays and legal holidays are excluded in computing the time when notice should be sent. Notice of the first occurrence of dishonor should be given, the one presentment and demand,

² *Big Sandy Bank v. Chilton*, 40 W. Va. 491. 265.

⁴ *King v. Crowell*, 61 Me. 244.

³ *Wood v. Callaghan*, 61 Mich. 402; ⁵ *Smith v. Poillon*, 87 N. Y. 590.

Butler v. Duval, 4 Yerg. (Tenn.)

followed by dishonor of paper, laying the legal foundation—upon due notice being given—to hold indorsers.

Paper once dishonored need not be presented again in the hope that it will be paid and it should not be so re-presented, if one wishes to surely hold indorsers. Failure to protest and to give due notice on the first dishonor may be deemed a waiver of the right to call upon indorsers. To charge the indorser of a note payable on demand he must be given notice of nonpayment on the first demand; and notice of nonpayment, on a second demand, even though it be received by the indorser as soon as would a notice had it been sent after the first demand, will be insufficient. Nor is it sufficient to hold indorsers, to prove that notice of dishonor for nonpayment of a draft was sent where there had been previous dishonor of the paper by its non acceptance and no protest and notice was thereafter sent. This is so even in the case of bills which need not have been presented for acceptance, if as matter of fact they were so presented, and their acceptance was refused. ⁶

Where the holder of a bill tenders it to the drawee for acceptance before it is due, and acceptance is refused, but the holder keeps it until it is due and then presents it for payment which is also refused, and then returns to the second indorser, and he not knowing of the laches of the holder in not protesting the paper for non-acceptance takes it up, it has been held that his ignorance of the laches of the former holder of the bill when paid, would not entitle him to recover against the first indorser who sets up that laches as a defense. ⁷ Such a payment however having been made under a mistake of fact may be recovered from the party to whom it was made. ⁸

§102. When Negotiated After Dishonor.—The indorser before maturity of a bill or note which has been dishonored, and whose liability has been fixed by due notice, is not entitled upon further negotiation of the instrument, to additional notice at the hands of such subsequent holder. ⁹ And if an indorser originally charged with notice pays the

⁶ United States v. Barker, 2 4Fed. Cas. 1004.

⁷ Talbot v. Nat'l Bank of Commonwealth, 129 Mass. 67.

⁸ Bartlett v. Benson, 2 M. & W. 737.

⁹ St. ohn v. Roberts, 31 N. Y. 441.

note or bill and receives it back, and puts it in circulation a second time without erasing his endorsement, he will be liable to a subsequent indorsee without further notice of dishonor, he being estopped from denying such liability.

§103. **When Note Payable In Installments.**—Notice of dishonor being required in the case of all bills and notes, at once upon their being dishonored, in order to charge indorsers in the case of a note payable in installments, notice should be given of the non-payment of each unpaid installment. The omission to give notice of the non-payment of an installment will not however affect the liability of an indorser of the note for the non-payment of an installment of which he had been duly notified.¹⁰

§104. **Form of Notice.**—The notice of dishonor is not required to be in any prescribed language. Nor must it necessarily be in writing. Verbal notice will be sufficient if it covers all the essentials of due notice. When given in writing it should be dated so as to aid in the identification of the paper. If the name of the person sought to be held is omitted, or is inaccurately stated, it will render the notice invalid as to him. So also the omission of the place of address of such party, or an inaccurate statement thereof, although if the notice be in fact received, the incompleteness or inaccuracy of address will be immaterial.

Sufficient facts must appear in the notice to constitute it a notice of dishonor—those facts essential to due notice as previously given¹¹—and the contents of a written notice may be proved without the production of the notice itself. The notice should so designate or distinguish the paper protested as to leave no reasonable doubt in the mind of the party notified as to which paper is intended; but immaterial omissions or misdescriptions will not vitiate a notice.¹² The notice should be signed by the notary or other party protesting the paper, or at least accurately indicate the person from whom it proceeds.

§105. **Mode of Giving Notice.**—Notice of dishonor may be sent by mail though it has been held that when the

¹⁰ Fitchburg Ins. Co. v. Davis, 121

Mass. 121.

¹¹ See, Ante, §99.

¹² Townsend v. Heer Dry Goods Co.
85 Mo. 508.

parties reside in the same immediate neighborhood, and are accustomed to receive mail at the same post office, such notice should be served personally, or left at the residence or place of business of the person to be charged.¹³ It has been said that the mail service is to be resorted to only when the parties live in different towns or at a wide distance apart in large cities; but if a notice so deposited be in fact received in due time, it will be held sufficient. The deposit of a notice duly addressed and with sufficient postage thereon, in a street letter box provided by the post office department for the reception of letters, or the delivery of such a notice so prepared to an official letter carrier, will be deemed sufficient irrespective of whether it was ever in fact received.¹⁴

§106. **Misdirected Notice.**—If the party giving notice be ignorant of the place of residence or business of the party to be notified, he should exercise due diligence in making inquiry regarding the same. This inquiry must be ordinary and reasonable; and when he acts in good faith upon the information so obtained the party to be charged will be held liable even though the notice may have been sent to the wrong place.¹⁵ Where however after such diligent inquiry no place of business or place of residence of the party to be charged can be ascertained, a notice addressed to him and deposited in the post office at the place of residence of the holder of the paper will be sufficient.¹⁶

§107. **What Will Excuse Protest and Notice.**—It has been held that where the drawer of a bill has no effects in the hands of the drawee, and hence no financial right to expect that the drawee will honor such draft, yet the drawer will not be discharged for want of presentment of the paper or notice of dishonor. However, a drawer is entitled to the presentment of his draft and notice if it is dishonored, if, at the time of drawing, he had reason to expect his bill would be honored, based upon a state of facts connected with the transactions as they then existed between the drawee and himself, even if he had no actual credits with

¹³ *Forbes v. Omaha Nat'l Bank*, 10 Neb. 340.

¹⁵ *Garver v. Downie*, 33 Cal. 176.

¹⁶ *Staylor v. Ball*, 24 Md. 200.

¹⁴ *Pearce v. Langfit*, 101 Pa. St. 511.

the drawee.¹⁷ If an instrument be void an indorser thereof is liable without proof of demand and notice.

Where a drawer or indorser receives funds from the acceptor or maker, for the special purpose of paying the bill or note, or agrees to pay the same upon having security placed in his hands, he cannot insist upon demand or notice, he having no remedy over, when he thus assumes primary liability. But where such primary liability is not assumed when receiving security, such party is still entitled to demand and notice.¹⁸

When the drawer and drawee of the paper are the same person no notice nor presentment is necessary. So, too, if a bill be drawn on a partnership by one of its members; or by the partnership on one of the firm, notice is unnecessary.

If the maker or acceptor abscond subsequent to the making of a note or the accepting of a bill, and before maturity thereof presentment to him or an attempt to make such presentment is unnecessary as it would be unavailing. But if the instrument be made payable at some specified place, as at a particular bank,, or a named address, it should nevertheless be presented at that place.¹⁹

If demand at the place of payment as specified in the instrument has become impossible by reason of the fact that the place has ceased to exist, such presentment is unnecessary.²⁰

§108. **Waiver of Notice.**—The right of a drawer or indorser to require presentment protest and notice may be dispensed with by his waiver of same. An agreement of waiver, between an indorser and the maker of paper will inure to the benefit of an indorsee.²¹ Such act or declaration must be the act of the person entitled to take advantage of such formality. Any member of a partnership may make such a waiver on behalf of the firm without special authority if the paper was executed in the course of the partnership business; and it may be so made even after the dissolution of the firm.²²

¹⁷ French v. Bank of Columbia, 8 U. S. 153.

¹⁸ Ray v. Smith, 84 U. S. 411.

¹⁹ Farwell v. St. Paul Fruit Co. 45 Minn. 499.

²⁰ First Nat. Bank v. Wever, 15 S. W. Rep. 41.

²¹ Rogers v. Hackett, 21 N. H. 100.

²² Darling v. March, 22 Me. 184.

If a waiver be contained in the body of a written instrument it binds each party to the contract who sign the instrument. If however a waiver be contained in an indorsement, it binds only the person making it and does not affect the other indorsers.

A waiver may be made by a drawer or indorser at the time of the execution of the instrument, or of the indorsement, or any time thereafter before maturity of the instrument. A waiver may be in direct and positive terms, by implication, or by an understanding between the parties of such a character as to be clear that a waiver is intended.²³ Waiver of protest is equivalent to an express waiver of presentment and notice as well as of protest.²⁴ Waiver of notice however is not a waiver of due presentment and demand.²⁵ Waiver may be implied from the act or language of a drawer or an indorser which would put a reasonable person off his guard or would induce him to forbear making presentment or notice.²⁶

An agreement made before maturity to renew an instrument, or to extend the time of payment, waives the necessity of demand and notice; but an agreement to extend the time for bringing suit thereon is not such waiver; nor is the mere request for a forbearance.

If the drawer or indorser with knowledge of the neglect of the holder to use due diligence, promises to pay, or assents to the continuance of his liability as if due diligence had been exercised he thereby waives the consequence of the laches of the holder and stands in the position as if he had been properly charged by presentment, demand and notice.²⁷ If however he be ignorant of the laches, such promise to pay will not be binding.

§109. **Proof of Notice.**—The party bringing an action on commercial paper that has been protested, must allege and prove notice,—as well as presentment, demand, and protest—or show sufficient cause for failure to send such notice. He may show the receipt of such notice affirmatively or by admissions of the defendant. Or it may be shown

²³ Johnson Co. Bank v. Lowe, 47 Mo. App. 154.

²⁴ Lancaster Bank v. Hartman, 110 Pa. St. 196.

²⁵ Sprague v. Fletcher, 8 Ore. 367.

²⁶ Quaintance v. Goodrow, 16 Mont. 376.

²⁷ Curtis v. Sprague, 51 Cal. 239.

that all the necessary steps were taken as provided by law; in which case the defendant is presumed to have received the notice. It will be sufficient if facts are proven that raise a prima facie presumption of the notice having been sent.²⁸

²⁸ Saco Nat'l Bank v. Sanborn, 63 Me. 340.

QUIZZER.

PROTEST

- 1-§91. To what does protest in its general sense refer?
- 2- When is it indispensable, and for what purpose is it made? *A foreign bill of exchange*
- 3- On what paper is it legally unnecessary? *Inland bill*
- 4- Define protest. *notes*
- 5-§92. Is strict formality required? *yes*
- 6- What should the certificate contain—state fully?
- 7-§93. When should the protest be made? *on day of demand*
- 8- Where should it be made? *at place*
- 9- By whom should it be made? *notary*
- 10- Need it be made by any law officer—if not by whom else and when can it be so made? *A good citizen*
- 11-§94. Of what is the certificate of protest prima facie evidence? *of its own authority—facts of present*
- 12- Is the protest of an inland bill or promissory note of any value—if so, what? *same as foreign bills*
- 13- Can it be used to refresh the notary's memory? *yes*
- 14- Of what facts is it evidence? *facts set forth in*
- 15-§95. Is the certificate of protest ever evidence of notice of dishonor—if so, when? *when stated therein*
- 16- What must it then contain—state fully?
- 17-§96. How far is the certificate evidence of collateral facts. Give illustration of collateral facts that such certificate will not prove.
- 18-§97. How may the facts be proven if the certificate be lost or destroyed?
- 19-§98. When are protest fees a legal charge—and against whom? *signature party protested*
- 20- Are they a charge when there is no indorser—and why? *no—protest is unnecessary*

- 21- Can they be charged against a guarantor—and why? *no, his liability is already fixed*

NOTICE OF DISHONOR

- 1-§99. To whom must notice of dishonor be given? *all who sign*
- 2- What is the effect of the failure to give such notice? *release from liability*
- 3- If a party has knowledge of the dishonor otherwise than by due notice, is he still entitled to such notice? *yes*
- 4- Define "due notice." *Legal notice by protesting of J. J.*
- 5- If a bill of exchange be presented for acceptance and refused should notice be given—and why? *yes*
- 6- Is it necessary to give notice to the drawer in order to hold the indorser? *no*
- 7-§100. May a holder notify all indorsers, and what will be the effect of such notice? *yes*
- 8- Is he required to do so—if not what is he required to do? *notify the indorser to whom he looks for p.*
- 9- Will a holder's immediate indorser be discharged for the failure to notify prior indorsers? *no*
- 10- To whom only is a holder required to send notice—and what should such party then do? *immediate indorser*
- 11- What is required of an indorser who receives notice in order to have a remedy against a prior indorser? *give him notice*
- 12-§101. When must notice of dishonor be put in transit? *at once*
- 13- Is a notice given prior to dishonor good—and why? *so*
- 14- Must notice be given of the first dishonor of paper—and why? *yes*
- 15- Should paper once dishonored be again presented for payment? *no*
- 16- What is the legal danger of such re-presentation?
- 17- Would notice of the dishonor of a second demand be sufficient, where previous demand had been refused—and why?
- 18- Where a bill, not necessary to be presented for acceptance, was so presented and was refused, and then was presented for payment and again refused, of which last refusal alone notice was sent, what will be the effect?

- 19- What will be the position of a second indorser who not being aware of the facts stated in the last question, takes up the bill—state fully?
- 20-§102. What are the rights of an indorser before maturity—where a bill has been dishonored and notice given—upon the further negotiation of the instrument? *He is still liable*
- 21- If an indorser who had notice takes up the paper and puts it into circulation a second time, is he entitled to notice from a subsequent indorsee—and why? *no*
- 22-§103. What is the rule as to notice of dishonor where a note is payable in installments? *Give notice on each*
- 23- What will be the effect of failure to give notice in the case of one particular unpaid installment?
- 24-§104. Is any particular form of notice required?
- 25- Must notice of dishonor be in writing?
- 26- When in writing what should it contain; and what will be considered fatal omissions? *wrong name*
- 27- What proof, if any, will render incompleteness or inaccuracy in a notice immaterial?
- 28- Must a written notice be produced to prove its contents? *no*
- 29- What must the notice contain, and what omissions if any, will not affect it?
- 30-§105. When parties reside in the same immediate neighborhood how should the notice be given? *before*
- 31- When may mail service be resorted to in serving notice?
- 32- What will be the effect of depositing a notice in a street letter box or when delivered to a letter carrier? *OK*
- 33- What will make the mode of service immaterial?
- 34-§106. What course, as to giving notice, should be pursued when one is ignorant of the place of business or residence of party to be notified?
- 35- How can notice then be sent? *in holder's P.O.*
- 36-§107. What will excuse presentment, protest and notice?
- 37- When is the drawer of a bill legally entitled to have it presented, and so to get notice?

- 38- What will be the effect of a void instrument as to the necessity for presentment and notice?
- 39- What effect will the fact that the drawer or indorser has funds in his hands for the purpose of paying the instrument have?
- 40- How would this apply if it is securities that are so held?
- 41- Is there any exception—if so, what?
- 42- What effect will the fact that the same person is the drawer and drawee of paper have as to right to notice?
- 43- What, if the bill is drawn on a firm by one of its members?
- 44- How, if it is drawn by one of the partner's, on his firm?
- 45- What is the rule as to necessity of notice in the case of an absconding debtor?
- 46- What is the rule as to presentment when the place specified in the bill has ceased to exist?
- 47-§108. Can presentment, notice and protest be waived?
- 48- Who will such waiver affect?
- 49- By whom can such waiver be made?
- 50- When can such waiver be given by a member of a firm—and is special authority to waive required?
- 51- How will such right be affected by the dissolution of the firm?
- 52- What will be the effect of a waiver contained in the body of an instrument?
- 53- What is its effect if it be in the indorsement only?
- 54- When may a waiver be made?
- 55- In what manner must a waiver be made?
- 56- What will be the legal effect of a waiver of protest only?
- 57- Will waiver of notice have the same effect—if not what is its effect?
- 58- Can waiver be implied by act or language—if so, what must be its nature?
- 59- What will be the effect, on the question of waiver, of an agreement made before maturity of paper—to renew it?

- 60- Will an agreement extending the time of bringing suit on paper have a similar effect?
- 61- How will it be affected by a request for a forbearance?
- 62- What will be the effect of a promise to pay, after neglect to conform to the formalities, where the party knew of such neglect?
- 63- If there is no such knowledge will it alter the situation—if so, how?
- 64-§109. On whom is the burden of showing that everything necessary to hold indorsers has been complied with?
- 65- How may it be shown?
- 66- What is the presumption after such proof is made?
- 67- To what extent must such proof go?

LESSON 15.—

CHAPTER XII.

ACTIONS AND DEFENSES.

§110. In General.

- 111. Joint Parties.
- 112. Divisibility of Cause of Action.
- 113. Instruments to Bearer or With Blank Indorsement.
- 114. Instruments Specially Indorsed.
- 115. What Constitutes Right to Sue.
- 116. Who may be Sued.
- 117. When Right of Action Accrues.
- 118. When Right of Action Expires.
- 119. Revival of Right of Action.
- 120. Several Actions on One Instrument.
- 121. Action Against Indorser and Surety.
- 122. Joint and Several Liability.
- 123. Actions on Collateral Securities.
- 124. Action on Lost Paper.
- 125. Allowance of Interest.
- 126. Defenses to Commercial Paper.
 - (a) In General.
 - (b) Repudiation of Instrument.
 - (c) Illegality of Instrument.
 - (d) Discharge and Payment.

§110. **In General.**—The holder of a negotiable instrument having a legal title thereto, may sue thereon in his own name whether he possesses a beneficial interest in its contents or not. If there be a special indorsement thereof to a particular person, such holder may still sue in his own name although his name be indorsed on the paper after such special indorsement.

Agents, receivers, trustees, or personal representatives of deceased persons, may sue in their own names on instruments belonging to their principals payable to bearer, or indorsed in blank. If however they be indorsed specially to a particular person, no one but such person, or his legal representative can maintain suit thereon.¹ A party for accommodation who pays the instrument may sue prior, but not subsequent parties thereon for reimbursement.

Where a bill or note is made payable, or is indorsed specially to a firm, all partners must join in a suit on the instrument. If one of them should die, the action should be brought by the survivors. If the paper be indorsed in blank, either partner may fill it up in his own name and sue accordingly; and if it be indorsed to one member of a firm, it may be filled up and suit brought in the firm name.

¹ Burch v. Daniel, 109 Ga., 256.

The acceptance of a bill or the giving of a note suspends all right of action on the original debt for which such paper is given, so long as such instrument has not matured. When it falls due the right of action is revived and the creditor or holder has the right to elect on which liability—whether the original debt or the acceptance or note—he will bring suit. If he brings it on the original debt he must either produce in court and surrender the note or bill; or satisfactorily account for its absence so as to protect the debtor against a negotiation of it before maturity, and a consequent subsequent liability on it to some innocent purchaser.²

§111. **Joint Parties.**—A copartner cannot sue a firm of which he is a member on an instrument payable by it to himself, for that would in fact be suing himself; but if a firm make an instrument payable to the order of a copartner, and he indorse it to another party not a partner, the indorsee may sue the firm. So, joint parties who are not partners—that is to say individual parties to whom paper is payable jointly—must all unite in an action if they be living, and in the event of the death of one of them the remedies survive to those living, without uniting in the action the personal representative of the deceased joint party.³

One not originally a party to a bill who pays it *supra* protest, may sue all parties not subsequent to the party for whose honor he has paid. A banker who pays the acceptance of a customer payable at his bank, which has not been provided for by the customer, is not such a party, however.

§112. **Divisibility of Cause of Action.**—An entire demand cannot be divided and suits maintained on its several parts. Such a claim is in other words legally indivisible; and if sued upon must be sued on as a whole. For instance an instrument for \$500 due according to its terms on a fixed date and not in installments, cannot be separated into five claims of \$100 each—or into any other sums—and suit brought upon each division or part.

A recovery for part of such demand, if it is divided and suit brought upon one portion thereof, will bar an action for the remainder, provided it be due at the time the first action

² *Allen v. Tate*, 58 Miss., 586.

³ *Allen v. Tate*, *supra*.

is brought.⁴ Of course, if by its terms an instrument is payable by installments and only so, suit may be maintained on each installment that is unpaid when due.

§113. Instruments to Bearer or With Blank Indorsements.—An instrument payable to bearer, or indorsed in blank, may be sued on in the name of the nominal or actual holder. Mere possession of such paper is *prima facie* evidence of the possessor's right to sue on it. This right cannot be rebutted by proof that he actually has no beneficial interest in the paper unless there be an allegation in the answer, of *mala fides* on the part of the plaintiff. Proof of such bad faith, and of wrongful possession of the paper would however defeat a holder's right to recover.⁵

A holder of paper under an indorsement in blank may fill it up in his own name thus making the paper payable to himself this being but a formality which as we have already learned such a holder has a legal right to do. Or he need not fill up the indorsement at all, as the suing on it is evidence of his intention to treat the indorser who is sued, as a transferror and indorser to himself.⁶

§114. Instruments Specially Indorsed.—Where an instrument is specially indorsed to the holder and is not payable to bearer or indorsed in blank, a nominal holder merely cannot, unless authorized by statute, sue in his own name. This for the reason that the legal title to the paper is still in the transferror in such a case, and his name must be used as plaintiff, as the real party in interest, to maintain an action. Where however an instrument specifically indorsed to a certain named person is in the possession of such person as the legal holder and owner thereof, of course he may in his own name maintain legal action thereon.

§115. What Constitutes Right to Sue.—The right to sue in one's own name must exist at the time suit is brought. An indorsement made afterwards but before the trial, whereby a party for the first time then obtains such right, will not be sufficient.⁷ The right to maintain legal action must continue in the plaintiff during the life of the

⁴ *McLeod v. Snyder*, 110 Mo., 298.

⁵ *Illinois Conference v. Plagge*, 177 Ill., 431.

⁶ *Poorman v. Mills*, 35 Cal., 118.

⁷ *Alabama Terminal etc. Co. v. Knox*, 115 Ala., 567.

suit. Hence a transfer of the instrument sued upon during the pendency of a suit thereon operates as a discontinuance of such action unless the new purchaser of the instrument is duly substituted as plaintiff.

Where there are several indorsers, the action need not be in the name of the last holder. Any indorser may sue, by striking out the subsequent indorsements. A holder's own indorsement if left uncanceled, will not prevent his right of recovery, as his possession of the paper will raise a legal presumption that he has not delivered it under the indorsement. And suit may be brought even without actual possession of the instrument, if the indorsee holds it merely as agent or trustee. But if the title to the bill, as well as its possession, be in another, an indorser cannot maintain an action thereon.

An action should be brought by the party entitled to receive the proceeds of the instrument. A defendant in such case however cannot question the plaintiff's title except on the ground of bad faith in the plaintiff, or of substantial prejudice therefrom to the defendant's rights,⁸ unless it be in a jurisdiction where it is required by statute that the suit be brought by the real party in interest. As a general rule one who holds under a blank indorsement is the real party in interest, but a defendant may show that a plaintiff seemingly so holding has in fact no such title, for although possession of paper, while it lasts, carries with it the presumption of title it does not prevent proof that in fact the possessor of paper has no such title.⁹

§116. **Who May Be Sued.**—Ordinarily an action cannot be maintained against a party who has indorsed paper subsequent to the plaintiff. Were the rule otherwise, a defendant in such an action might as indorser, recover back from the plaintiff—on the latter's liability as an indorser previous to the defendant—the very amount recovered from him. In the case of an original indorsement to the defendant, without recourse, or without consideration, who had indorsed the paper back to the plaintiff absolutely and for value, or where other special circumstances of like legal import arise, this would not apply.

⁸ Caldwell v. Lawrence, 84 Ill., 161.

⁹ Hays v. Hammond, 74 N. Y., 486.

(An indorser cannot sue an acceptor or maker until he has paid the obligation.) In a suit by an indorser against a prior party to the paper, it is necessary, as a basis for his right of action, for him to show that notice of non-payment and protest was duly received by such prior party.

§117. **When Right of Action Accrues.**—(As soon as payment is refused the right of action commences, provided that all the necessary formalities to fix liability on indorsers and others have been complied with. It is not necessary before beginning action to wait until sufficient time elapses to permit all parties to receive notice of dishonor, so long as the necessary steps are in fact taken to fix their liability before action is begun.¹⁰)

(When a bill is dishonored for non-acceptance, a right of action accrues at once against the drawer and the indorsers, provided the proper steps are taken to render them legally liable. It is not necessary to wait for the maturity of the paper, in such cases.)

§118. **When Right of Action Expires.**—(When the right of action expires depends largely upon the provisions of the statute of limitations in force in the state where the right arose.) While the length of time in which an action can be maintained under such statute varies in the several jurisdictions, yet under all, the statute always begins to run from the day when the right of action accrues.)

Whether payment by one of the makers of a joint or a joint and several obligation takes it out of the statute as to the others, is a rather vexed question. The better opinion on this subject is that if the obligation be joint such payment will extend the statutory limitations as to the other makers, but that if it be joint and several, it will not.

(Where several are jointly bound on an instrument, service of process in an action begun thereon on one of the parties will stop the running of the statute as to all.)

(Where one of two or more sureties pays the surety obligation before it is barred by the statute, such surety may maintain an action against his co-surety or co-sureties for contribution of payment even after the bar of the statute be complete as to the original obligation.) (The reason for

¹⁰ Shed v. Britt, 1 Pick. (Mass.), 401.

this is that such surety's right in that action accrues only from the date of the payment by him. ¹¹)

(A payment by a surety however will not revive an obligation as against the principal debtor, if it be already barred by the statute of limitations.)

(Most states also have a provision that the operation of this statute is suspended as against a person, against whom a right of action accrues, if he is out of the state and hence beyond the jurisdiction of its courts, until his return to the state.) (The period during which such party is absent from the state is not, therefore included in the computation of time under the statute.) Such a provision does not refer to a temporary absence with one's fixed residence within the state, but to an established domicile out of the state and a residing out of the state. ¹²

(Unless special circumstances arise to change the rule the statute of limitations of the place where a suit is brought governs the right of action.)

§119. **Revival of Right of Action.**—An acknowledgement of a debt, or a new promise to pay a debt, made by a debtor after the right of action thereon is barred by the statute of limitations, will revive the right of action so that the time under the statute will then begin to run anew from the date of such acknowledgement or new promise. (The acknowledgement must be such as to imply a promise to pay the barred debt and must be of such a character as will clearly identify the debt; furthermore it must be unconditional.)

(In most states it is provided by statute that such acknowledgement or promise must be in writing and signed by the person to be charged. Prior to the passage of such acts, and in jurisdictions where they do not exist, a verbal promise to pay is sufficient. ¹³)

(An acknowledgement or promise made to one party to an instrument inures to the benefit of all subsequent parties thereof but does not apply to prior parties.) Part payment of an outlawed debt amounts to an acknowledgement of the debt, from which a promise will be implied by law; as will a payment of interest on a debt. But realizing on collateral

¹¹ McCrady v. Jones, 44 S. C., 406.

¹³ Briscoe v. Anketell, 28 Miss., 371.

¹² Farr v. Durant, 90 Wis., 341.

given to secure the original debt will not affect the statute as applying to such debt. (In fact no payment but a voluntary one directly made or authorized will suffice to revive a barred indebtedness.)

(The burden of proving such an acknowledgement or new promise is on the party alleging it.) Such proof need not be in writing unless so required by statute although such evidence is always most conclusive.

§120. Several Actions on One Instrument.—At common law it was possible for a holder of dishonored paper to bring simultaneous actions against all parties liable to him thereon. This is the rule at present although it is possible to sue the maker and indorsers separately if the holder so elects. Judgment recovered against one indorser and not satisfied, is no bar to a subsequent action by the same plaintiff against the maker. And an action may be maintained against an indorser even after judgment is had against the maker, where the judgment has not been satisfied.¹⁴

§121. Action Against Indorser and Surety.—Where an indorser sues a prior indorser for money paid on an instrument whereon both are liable it is necessary for him to prove that he has actually made payment of the paper. It will not be sufficient for him to show that judgment has been previously recovered by his indorsee against several indorsers. (Only the actual liquidation of the indebtedness by him gives him a right of action against the prior parties.) (A surety on an instrument cannot be sued in most instances until due diligence has been used to collect from the maker or principal debtor.)

§122. Joint and Several Liability.—Parties jointly liable should be jointly sued. Successive indorsers are not joint makers, hence need not be sued jointly although they may be joined in one action if it is deemed desirable to do so. Judgment against one joint maker will be a bar to further action against the other.¹⁵

Where however the liability is joint and several separate actions may be brought against the several makers, and as to the joint makers they should be proceeded against

¹⁴ *Righter v. Van Riper*, 3 N. J. Law., ¹⁵ *Holman v. Langtree*, 40 Ind., 349. 287.

jointly. On liability that is both joint and several as to certain parties, actions may be maintained against them either jointly or severally at the option of the holder of the paper.

Under statute at the present time in most of the states, and in England, all parties to a bill or a note may be joined as defendants in one action. In some instances sureties are also expressly included. Makers and indorsers can now be sued together in one action. Without such a statute successive indorsers could not have been joined as defendants in the same action.¹⁶

§123. **Actions on Collateral Securities.**—What action is to be pursued regarding collateral securities depends upon the jurisdiction in which the question arises. (It may be said generally however that it is the duty of the holder of paper to collect the collateral given to secure it when it becomes due, regardless of whether the instrument has matured or not. Where collateral is received without any special agreement concerning it, the party receiving it is liable for ordinary diligence in realizing thereon.) His negligence in that particular, especially if thereby the security is rendered valueless, discharges the debt which it secured.¹⁷

§124. **Actions on Lost Paper.**—In the event of the loss of commercial paper the owner should at once notify the parties to it, so as to prevent their taking it up without due inquiry. (An advertisement in the public press or by posters or other form of public notice of the loss, is one method of giving notice to others to avoid their receiving such paper.) (In some states an allegation that such notice has been given is necessary in an action on such paper, before recovery can be had on it.) If the instrument has been absolutely destroyed however, as by fire, or through error or otherwise, and the proof thereof is clear and convincing, no such allegation is necessary. While ordinarily in the event of loss, indemnity to protect the payor in case the instrument later turns up in other hands is required to be given before payment will be enforced, in the case of the sure destruction of paper no indemnity is as a rule required.

¹⁶ Wolf v. Hostetter, 182 Pa. St., 292.

Iowa, 377.

¹⁷ First Nat. Bank v. O'Connell, 84

§125. **Allowance of Interest.**—(Where interest is provided for in an instrument, it will be included in the amount recoverable at law in an action on the instrument.) (Where however interest is not specifically provided for an instrument draws interest from the time of its maturity at the legal rate without prior demand.)

(The rate of interest when allowed is governed by the law of the place where the instrument is made and in force at the time the instrument is made.) (When interest is not provided for, then the law in effect at the time of the maturity of the paper, if it differs from that affecting it at the time it was made, will control.)

(In the case of demand notes without express reservation of interest, they bear interest from the date of the demand only; or from the time of the commencement of suit, when no other verbal demand has been made.)

§126. **Defenses to Commercial Paper.**—(a) **In General.**—All defenses to negotiable instruments are practically based on three grounds; (1) Repudiation—that is to say, that the party did not execute the instrument set up; (2) Illegality—that the instruments as alleged had no legal binding force; and (3) Discharge—that the defendant's liability thereon has been discharged or modified.

(b) **Repudiation of Instrument.**—(Forgery and alteration come under this head.) A forged instrument is not the contract of the party named and will involve no liability on his part, unless by some sanctioning action of his own he is estopped from setting up the defense.

An alteration to be available must be a material alteration, and if so it will be sufficient to discharge all parties not consenting to it, without any allegation or proof of fraud.¹⁸ If an alteration is immaterial and does not in any way vary the meaning of the paper or the liability of the parties thereto, it will not invalidate it. But any alteration which changes the operation of the instrument or the liability of the parties is material, whether the change be prejudicial to the parties or not.

Proof of either of these facts will constitute a good de-

¹⁸ Eckert v. Pirkel, 59 Iowa, 545.

fense even against a bona fide holder before maturity, as such fact renders the paper void.¹⁹

(c) **Illegality of Instrument.**—Illegality and fraud belong to the second class of defenses referred to. In the earlier lessons we have discussed the effect on a contract, and on commercial paper in particular, of illegal consideration. It is not necessary to dwell farther thereon in this connection, except to say that where a consideration for paper is clearly illegal, that fact is always a good defense thereto.

Where the exaction of usury is prohibited the fact of usury in the making of a note, avoids it as against all parties. The question of usury is one difficult to discuss in general terms for in many of our states it has been practically done away with by statute, and in others its effect is regulated so that the entire matter rests on statute for its construction and effect. It may be said, however, that where by mistake a note is made to draw interest in too large a sum, it will not be held usurious where the mistake is clearly shown and no usurious intent existed.

Fraud vitiates commercial paper the same as it does all other contracts. It may be accomplished by false representation. If so such representations must be material to the obtaining of the paper and must have induced the party to execute or deliver it. The fraudulent concealment of material fact has the same legal effect as a direct false statement.

(Fraud that renders an instrument void may be either in its inception or in its subsequent transfer.) Hence paper originally obtained by fraud or for a fraudulent consideration, will be held void if that act be pleaded as a defense and is proven.)

(It will be no defense to the maker of an instrument to show that an indorsement thereon was procured by fraud against the indorser; nor can an indorser set up that the instrument was procured by fraud or duress upon the maker.) A guarantor however may set up that the note guaranteed by him was obtained by fraud from his principal.²⁰ And where one in good faith deposits paper in a bank for collection and the bank is known by its officers

¹⁹ Gettysburg Nat. Bank v. Chisholm, 169 Pa. St., 564. Putnam v. Schuyler, 4 Hun. (N. Y.), 166.

to be insolvent at the time it receives such paper, it will amount to a fraud on the part of the bank and entitle the depositor to recover his deposits as made.²¹

(Fraud to be available as a defense must be specially pleaded, and the burden of proving the fraud alleged is on the party setting it up.)

(d) **Discharge and Payment.**—This class of defenses has been treated in the preceding chapter under the same heading. It is unnecessary therefore to say more here other than to emphasize the self-evident fact that where paper has been paid, or legal liability thereon has been otherwise satisfied, released, waived or barred, it is a lawful defense to an action to collect same from one so absolved from liability.

CHAPTER XIII.

THE NEGOTIABLE INSTRUMENTS LAW.

- §127. Generally.
- 128. Definition.
- 129. Form and Interpretation of Instruments.
- 130. Consideration.
- 131. Negotiation.
- 132. Rights of Holders.
- 133. Liability of the Parties.
- 134. Presentment for Payment.
- 135. Notice of Dishonor.
- 136. Discharge.
- 137. Bills of Exchange.
- 138. Checks.

§127. **Generally.**—As has been pointed out from time to time in the foregoing lessons on this topic, there are several important points upon which the courts of the several states have taken differing views; prescribing by their decisions varying rules of law within their respective jurisdictions upon identical questions of fact. The reason for this divergence of opinion is the fact that the custom of merchants in the various sections of the country, was not uniform upon certain matters, and the courts while engaged in the process of building up the law, in enforcing these, different mercantile customs, established the conflicting legal rules.

²¹ Cragie v. Hadley, 99 N. Y., 131.

For instance, and to name only a few common points of divergence. In some states the affixing of a seal to an instrument rendered it non-negotiable, while in others it did not. Likewise a provision for the payment of attorney's fees in case of dishonor, was held by some states to make paper unnegotiable, while in others it was the reverse. Again some courts said that the alteration of commercial paper made it absolutely void even in the hands of innocent holders; others held that the latter could enforce it according to its original tenor. Certain courts held that a check was an assignment of the amount of money called therefor, and hence denied the drawer the right to stop payment on a check duly issued by him, while the majority of the courts denied this doctrine.

Without continuing the illustrations farther it may be said that in these days of far-reaching commercial enterprise, where business operations are so greatly subject to and dependent upon the use of mercantile paper, this variance affecting rights and remedies arising out of such paper was little short of calamitous. Consequently concerted legislative action was sought by eminent commercial and legal bodies, to bring about unity of rule and procedure affecting commercial instruments.

The result of this movement is that since 1895 thirty-five states and territories have adopted acts substantially uniform in every controlling feature, and known as "The Negotiable Instruments Law." Its adoption by the remaining states at an early day seems assured.¹

This act created no new law, the aim being solely to adopt and embody certain prevailing rules. The law itself declares that "in any case not provided for in this act, the rules of the law merchant shall govern." Accordingly on any point omitted in that law, resort is not to be had to any previous statute,—as all statutes affecting commercial instruments have been repealed in the states adopting this

¹ The jurisdictions that have adopted this law are: Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Mon-

tana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

law—but to the custom of merchants as recognized by the courts of the state where such question arises.

Taking this law as it exists in the majority of the states which have it, we will now discuss its principal provisions and distinctions in connection with what has been said upon the same topics in our previous discussion of the law affecting such instruments. This discussion will however be only as to the main outlines of the law, the student being directed to the law in his own state, if it has been there adopted, for a full knowledge of same.²

§128. **Definitions.**—The definitions and meaning of terms as given in this act are substantially as we have stated them in these lessons. There are but one or two upon which it may be well to particularize at this time.

The vexing question as to what is or is not a “reasonable time” within which demand paper must be presented, or other matters the culmination of which is not specifically fixed otherwise, must be done, and which the courts had found it difficult to solve, is provided for in this act by the provision that in determining that question regard is to be had to the nature of the instrument, the usage of the trade or business, if any, with respect to which such instruments are given, and the facts of the particular case.

As to when it is necessary to present an instrument falling due on a Sunday or a legal holiday—concerning which prior to the adoption of this act and in many of the states where it is not yet effective authorities differed and differ, some claiming that it must be made on the day after while others required it to be made the day before,—is under this act specifically required to be made on the next succeeding secular or business day.

§129. **Form and Interpretation of Instruments.**—The provisions of the act regarding the form and interpretation of instruments also follows the established lines as we have laid them down. The act however goes somewhat farther than was sometime previously held, in that it provides that if an instrument is no longer in the possession of a party

² It is proper to note that the section numbers followed in this topic are not those corresponding to the sections of the Negotiable Instru-

ments Law, but are the consecutive section numbers of our lessons on this title.

whose signature appears thereon, a valid and intentional delivery thereof by him to another is presumed, until the contrary be proved.)

If the sum called for by an instrument is expressed in both words and figures, and there is a discrepancy between the two, the words govern, as under the former rule. If the writing be ambiguous or uncertain, then reference may be had to the figures to fix the amount.

If the ambiguity in an instrument be of a character that there is a doubt whether it be a bill or a note, the holder has the right of election as to which of these he will regard it.

Where a signature appears on an instrument, and if it be not clear in what capacity the person signing it intended to become liable on the paper, he will be deemed an indorser.

§130. **Consideration.**—The doctrine of consideration has been largely extended, in that every negotiable instrument is under this law deemed to have been issued for a valuable consideration, and each one whose signature appears thereon is deemed to have become a party thereto for value.)

It has also settled the question as to whether an existing or a pre-existing debt for which an instrument is given, is legal value, by answering it in the affirmative.

§131. **Negotiation.**—What constitutes negotiation is very much simplified by this statute. (It provides that negotiation is the transfer of an instrument from one person to another in such manner as to constitute the transferee the holder thereof.) (If payable to bearer it is negotiated by delivery.) (If payable to order it is negotiated by the indorsement of the holder, completed by delivery.) (An indorsement must be of the entire instrument.) (Hence an indorsement purporting to transfer to the indorsee a part only of the amount payable, or purporting to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument although if an instrument be paid in part, it may be indorsed as to the residue.) Where a person is required to indorse in a representative capacity; such as cashier, secretary, assignee or executor, the indorsement by him may be made in such terms as to negative his personal liability.

(The provisions as to the time of indorsement provide that unless it bear date after the maturity of the instru-

ment, every negotiation is deemed *prima facie* to have been made before the instrument was due.) (Unless the contrary appears, each indorsement is presumed also to have been made at the place where the instrument is dated.)

§132. **Rights of Holders.**—Who is a holder in due course, and his rights, are clearly fixed and set forth. It is provided that one who takes under the following conditions is a holder in due course, viz.:

1. That the instrument is complete and regular on its face.

2. That the party became the holder of it before it was overdue and without notice that it was previously dishonored, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity or defect in the title of the person negotiating it.

(If an instrument payable on demand be negotiated an unreasonable time after issue, the holder will not be deemed a holder in due course.) And if a transferee receive notice of infirmity in the instrument or defect in title of the person negotiating it, before he has paid the full amount agreed to be paid, he is only deemed a holder in due course to the extent of the amount theretofore paid by him.

(The statute sets out practically the same causes to which we have previously referred that would make title defective, and requires actual notice of the infirmity or defect, or knowledge of such facts that one's action in taking an instrument amounts to bad faith.)

The right of a holder in due course we have set out as well as those of a holder not in due course. The statute provides in this respect that a holder who derives title through a holder in due course who was not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter, and every holder is deemed *prima facie* to be a holder in due course. If it be shown that the title of any person who has negotiated an instrument be defective, the holder must prove that he or some person under whom he claims acquired title as a holder in due course; the rule however not applying in favor of a party who became bound prior to the acquisition of such defective title.

§133. **Liability of the Parties.**—The liability and warranties of the different parties, as well as those of a broker or agent, are set out under this heading, and practically reiterates the rules and the law as has been laid down in the course of these lessons. Accordingly we have not deemed it necessary to again refer specifically to them here.

§134. **Presentment for Payment.**—The provisions under this heading contain no additional features from those already described. The act clears up however some debated questions, as for instance the provision that an instrument at presentation must be exhibited to the person from whom payment is demanded, and when paid must be delivered to the party paying it; and that where several persons not partners are primarily liable on an instrument and no place of payment be specified therein, presentment must be made to them all.

It is prescribed that delay in making presentment for payment will be excused when it is caused by circumstances beyond the control of the holder, and is not imputable to his default, misconduct or negligence.) (As was stated during the course of the lessons, days of grace have been abolished. An instrument falling due on Saturday is to be presented for payment on the next succeeding business day, except those payable on demand, which may at the option of the holder be presented for payment before twelve o'clock noon on Saturday in states making that day a half holiday,—excepting, of course, when that day is a holiday.

It is also provided that if an instrument be payable at a bank it is equivalent to an order on the bank to pay the same when due, for the account of the principal debtor thereon. Payment made at or after the maturity of an instrument in good faith and without notice that the title of the holder is defective constitutes payment in due course.)

§135. **Notice of Dishonor.** — Notice of dishonor may be given by one who is an agent either in his own name or in the name of the party entitled to give notice, whether that party be his principal or not. When it is given by or on behalf of a party entitled to give notice, the holder and all parties subsequent to the party to whom notice is given receive the legal benefit of such notice. If an instrument be dishonored in the hands of an agent he may give notice

to the parties liable thereon or to his principal. If the notice be given to his principal it must be within the same time as if such agent were the holder, and the principal upon receiving such notice has the same time in which to give notice to the others on the instrument as if such agent had been an independent holder. (When a party is dead and such death be known, and there be no personal representative or he cannot with diligence be found, notice sent to the last residence or last place of business of the deceased will suffice.)

(Where parties live in the same municipality, notice by mail is specifically permitted; but it must be deposited in the mail so as to reach such parties in the usual course of the mails on the following day.) (If a party to be notified resides in a different locality notice by mail is to be given as we have hereinbefore stated.) (If given otherwise than through the mail then it must be given within the time that notice would have been received in due course of mail, if it had been duly and properly deposited in the postoffice.) (The term postoffice includes that method of depositing in regular mail receptacles to which attention has been called.) (If these rules are complied with, a miscarriage of the mails whereby a notice was not in fact duly delivered, will not legally affect the question of due and timely notice.) (Omission to give notice of dishonor by non-acceptance, does not prejudice the rights of one who is a holder in due course subsequent to such omission.)

(Where a waiver is embodied in an instrument itself, it binds all the parties thereto, but if written above the signature of an indorser it binds him only.)

§136. **Discharge.**—(In addition to the methods of discharge we have stated in the lessons, the Act provides that any act which will discharge a simple contract for the payment of money, discharges a negotiable instrument.)

(A holder has the right at any time to expressly renounce his rights against any party to the instrument. If such renunciation be absolute and unconditional as to the principal debtor, and is made at or after maturity of the instrument, it discharges the instrument.) (A renunciation, however, does not affect the rights of a holder in due course without notice.) Unless the instrument be delivered up to the person primarily liable thereon, a renunciation must be

in writing.)

If an instrument or any signature thereon appear to be cancelled and one allege that such is not really the case, the burden of proof lies on the party alleging that such cancellation was made unintentionally, or under a mistake or without authority.

The following are set down as material alterations such as would be sufficient to effect a discharge of instruments: (1) The date; (2) the sum payable, either principal or interest; (3) the time or place of payment; (4) the number and relation of the parties; (5) the medium of currency in which payment is to be made, or which adds a place of payment where no place of payment is specified, or any other change which alters the effect of the instrument in any respect.

(However if an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he can enforce payment according to its original tenor.)

§137. **Bills of Exchange.**—An additional provision has been incorporated in this act permitting the drawer or any indorser of a bill to insert thereon the name of a person to whom the holder may resort in case of need, in case the bill be dishonored by non-acceptance or non-payment. Such person is known as the “referee in case of need,” and a holder may or may not resort to his referee in case of need, as he sees fit.

(An exception between presentment for payment and presentment for acceptance is made in that in the case of presentment for acceptance when Saturday is not a holiday, such presentment should be made before noon on that day.)

If there be an acceptance for honor it may be for a part only of the sum for which the bill is drawn; which differs from a regular acceptance which must be of the bill. Where there has been an acceptance for the honor of one party there may be a further acceptance by a different person for the honor of another party on the paper.

(If a holder refuses to receive payment supra protest he loses his right to recover and of recourse against any party who would have been discharged by such payment.)

§138. **Checks.**—The provisions of the act applicable

to a bill of exchange payable on demand apply to checks. Certification of checks by the banks on which they are drawn is equivalent to an acceptance. Where the holder of a check procures its certification it discharges the drawer and all indorsers from liability thereon.

QUIZZER

ACTIONS AND DEFENSES.

- 1-§110. Who has the right to sue on commercial paper in his own name?
- 2- When may a person who holds in a representative capacity so sue?
- 3- When may an accommodation indorser who has paid the instrument sue thereon?
- 4- When must all the partners of a firm join in an action on paper transferred to the firm?
- 5- Can an action be brought by the surviving partners, and under what circumstances?
- 6- What course can be pursued by a firm if an instrument be indorsed to it in blank?
- 7- What effect as to the right of action on the original debt has the acceptance of a bill or the giving of a note therefor, have?
- 8- Does the right of action revive at any time—if so, when?
- 9- Has the creditor then any option as to how to proceed—if so, what?
- 10- If suit is brought on the original debt what becomes of the instrument given to witness it, and what is the reason for this proceeding?
- 11-§111. Can a co-partner sue his firm on an instrument made by it to himself,—and why?
- 12- Is there any way by which an action can be brought under these circumstances—if so, how?
- 13- Who must join in an action on paper payable to parties jointly who are not co-partners?
- 14- What is the course to be pursued if one of such joint parties should be dead?
- 15- Who are the parties to an action where paper is paid by a party supra protest?

- 16- Is a banker who pays the acceptance of his customer which has been provided for by the latter, such a party?
- 17-§112. Can several actions be commenced on an entire demand?
- 18- What will be the effect of a recovery of part of such a demand if it is divided and suit is brought on one part thereof?
- 19-§113. Can a nominal holder sue on paper in his possession—if so, when? *Yes*
- 20- What presumption arises in cases of such possession? *Prima Facie evidence*
- 21- What will result on proof that the holder has no beneficial interest in the paper?
- 22- When will such proof be permitted?
- 23- What will be the effect of such proof? *non suit*
- 24- Can a holder under an indorsement in blank, fill it up—and why? *Yes*
- 25- Is it necessary for him to do so? *no*
- 26- What presumption follows the beginning of an action by a holder against the indorser to him?
- 27-§114. Can a nominal holder sue in his own name on an instrument that is specially indorsed? *no*
- 28- Is this ever permitted—if so, when?
- 29-§115. When must the right to sue on paper in one's own name exist? *At time suit is brought*
- 30- Will an indorsement made after suit is brought, be sufficient to fix holder's right to sue? *no*
- 31- How long must the right of action continue in the plaintiff? *During the life of suit.*
- 32- What will be the effect of a transfer of the instrument sued upon during the pendency of an action thereon? *dismissal - judgment in favor of defendant on plea of non est*
- 33- Where there are several indorsers must a suit on the instrument be in the name of the last holder? *No*
- 34- May any indorser sue—if so, when? *no. Strike out*
- 35- Will the fact that a holder's own indorsement is uncanceled have any effect—and why? *no*
- 36- May suit be brought without actual possession of the paper—if so, when? *yes. It is enough to hold*

- merely as a holder

- 37- Will the fact that the paper, and the title to it, was in another make any difference—if so, what?
- 38- Who should bring an action on a commercial instrument?
- 39- Can a defendant question the plaintiff's title to paper in his possession?
- 40- If your answer to the last question be in the negative, state when it can be done if at all.
- 41- What is the general presumption in favor of one who holds paper under a blank indorsement?
- 42- Is proof rebutting such presumption permitted—if so, when?
- 43-§116. Can an action be maintained ordinarily against a party to an instrument subsequent to the plaintiff? Give reason for answer.
- 44- When may this be done, if at all?
- 45- What must an indorser show as a basis of his right to sue the maker or acceptor?
- 46- If an indorser sue a prior party on the paper, what is it necessary for him to show as a basis of his right of action?
- 47-§117. When does a right of action commence, and on what does it depend?
- 48- Is it necessary to wait until time shall elapse for all parties to have received notice of dishonor before beginning action?
- 49- When does the right of action accrue where a bill has been dishonored for acceptance?
- 50- Is it necessary in such a case to wait until the maturity of the instrument?
- 51-§118. Upon what does the time of expiration of a right of action depend?
- 52- When does the statute of limitations begin to run against a right of action?
- 53- If an obligation be joint, will a payment by one of the joint obligers take it out of the statute? If it be several, what will be the effect?
- 54- What effect will service of process on one of several joint parties have as to the operation of the statute against the others?

- 55- If one of several sureties make a payment before the obligation is barred by the statute, can he maintain an action against his co-sureties after the statute has barred the original obligation—and why?
- 56- Will a payment by a surety on paper barred by the statute revive it against his principal?
- 57- When is the operation of the statute of limitations suspended as against a debtor—and for how long?
- 58- What kind of non-residence in the state is contemplated by the statute as suspending its operation?
- 59- What statute of limitations controls an action?
- 60-§119. What is necessary to revive a right of action once outlawed?
- 61- When will the statute then begin to run anew against a right of action?
- 62- What must be the character of an acknowledgment of, or a new promise to pay, a debt to remove the bar of the statute?
- 63- In what form must the acknowledgment or new promise be expressed?
- 64- Is a verbal promise ever sufficient—if so, when?
- 65- What will be the effect of a new promise or an acknowledgment of indebtedness made to one of several parties who are creditors?
- 66- What will be the effect of part payment of an outlawed claim?
- 67- What the payment of interest on such a claim?
- 68- Will realizing on collateral given with an original debt, affect the running of the statute?
- 69- What kind of payment is necessary to revive a barred debt?
- 70- On whom is the burden of proving an acknowledgment of indebtedness or a new promise to pay?
- 71- May such promise be proven by parol?
- 72-§120. When if ever was it possible for a holder to bring simultaneous actions against all parties liable to him on dishonored paper?

- 73- Can the maker and indorsers be sued separately?
- 74- Will an unsatisfied judgment against an indorser now be a bar to an action by the same party against the maker?
- 75- Can an action be maintained against an indorser after judgment is had against the maker?
- 76-§121. If an indorser sue a prior indorser for money paid by him, what is it necessary for him to prove?
- 77- Will it be sufficient in such a case for such indorser to show a previous judgment recovered against several indorsers by his indorsee?
- 78- What is necessary before recovery can be had against a surety?
- 79-§122. How should those jointly liable be sued?
- 80- Are successive indorsers joint makers?
- 81- Will a judgment against one joint maker affect the other joint makers?
- 82- Should several makers of the one instrument be proceeded against in the same way?
- 83- Where the liability is both joint and several what course is to be pursued?
- 84- What is now the general rule as to the joining of parties?
- 85- Under this rule can makers and indorsers now be joined in the one action?
- 86- What is it that makes this possible?
- 87-§123. Upon what does the course to be pursued regarding collateral depend?
- 88- What is the duty of the holder regarding collateral when it becomes due?
- 89- Does the maturity of the principal instrument affect this course?
- 90- What is the rule where such collateral is received without any special agreement?
- 91- What will be the result of negligence in realizing on collateral?
- 92-§124. What should be done in the event of the loss of a bill or note?
- 93- What is the reason for this?
- 94- Is a public advertisement a proper form of notice to give concerning lost instruments?

- 95- Is it ever necessary in an action on lost paper to allege such a notice—if so, when?
- 96- Is this necessary if the paper be clearly shown to have been destroyed?
- 97- What is the rule regarding giving indemnity against lost paper in each of these cases?
- 98-§125. Where the instrument provides for interest can it be included in the amount recoverable?
- 99- If interest be not specifically provided for does the instrument draw interest—if so, from when?
- 100- Is it necessary to make a prior demand for it in such a case?
- 101- What law governs the rate of interest where interest is provided for?
- 102- When it is not provided for what law governs?
- 103- What is the rule as to interest on demand notes where it is not expressly reserved?
- 104-§126. What are the grounds on which defenses to negotiable instruments are based?
- 105-(a) Under which of the heads you name would you place forgery and alteration of instruments?
- 106-(b) Why should you place forgery under this head?
- 107- Is a party ever estopped from setting up this defense—if so, when?
- 108- What kind of alteration is necessary to constitute such a defense?
- 109- When is the alteration of an instrument a defense?
- 110- Is it necessary to prove fraud in such a case?
- 111- What kind of alteration is considered material?
- 112- How would proof of these facts affect a bona fide holder before maturity?
- 113-(c) To which of the classes of defenses does illegality and fraud belong?
- 114- What is the rule where usury exists?
- 115- On what does the question of usury depend?
- 116- If a note be drawn by mistake for an amount that would be usurious, what will be the effect?
- 117- Does fraud vitiate commercial paper?
- 118- Of what may the fraud consist?
- 119- What must be its character?

- 120- Is the time of the fraud material, or does it relate to the inception or the indorsement—state your understanding as to this, fully?
- 121- If a maker show that an indorsement was procured by fraud will it be a good defense as to him?
- 122- Can the indorsers set up as a defense a fraud perpetrated on the maker?
- 123- How will this state of facts affect a guarantor?
- 124- If a deposit be made in a bank, known by its officials to be insolvent at the time, what rights has the depositor?
- 125- To make fraud available as a defense how must it be pleaded?
- 126- On whom is the burden of proving the fraud?
- 127-(d) What can you say as to discharge and payment of paper as a defense to an action thereon?

THE NEGOTIABLE INSTRUMENTS LAW.

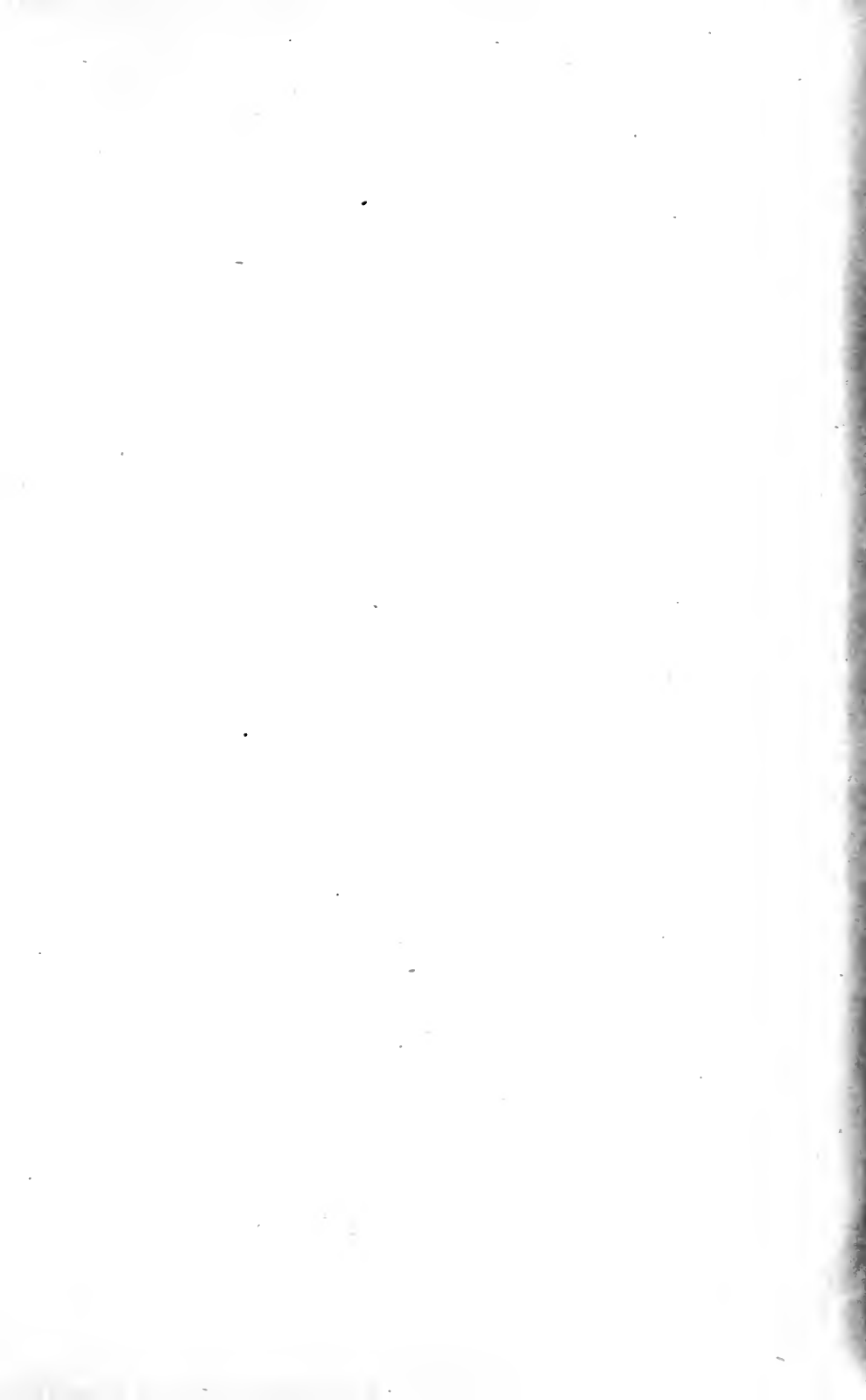
- 1-§127. What can you say as to the lack of uniformity on important points of judicial decisions affecting commercial instruments?
- 2- What was the reason of this divergence?
- 3- Name some of the points on which there was such divergence?
- 4- What effect did this divergence have upon modern business interests—and why?
- 5- What resulted therefrom and what was the final outcome?
- 6- Did the Negotiable Instruments Law create new law—if not, what did it consummate?
- 7- Is your state one of those that has adopted this law?
- 8- Upon points not covered by this law to what must resort be had in determining same—and why?
- 9- To what must regard be had in determining the question of reasonable time?
- 10-§128. Where this act is effective when is an instrument due on Sunday or a holiday to be presented?
- 11-§129. What is presumed if an instrument be no longer in the possession of a person whose name appears thereon?

- 12- If the sum to be paid is expressed in both words and figures, and there is a discrepancy between the two, which governs?
- 13- When do figures therein have any affect?
- 14- If there be a doubt as to whether an instrument is a bill or a note, has the holder any right of election—if so, what?
- 15- If a signature appear in an instrument and there is doubt as to what liability the person intended to assume thereby, to what liability will he be held?
- 16-§130. Is there now any presumption as to consideration—if so, what?
- 17- What is presumed in favor of one whose signature appears on an instrument?
- 18- Is an existing or pre-existing debt deemed a valuable consideration?
- 19-§131. How is negotiation defined by this statute? State fully.
- 20- What part of an instrument may be transferred by indorsement?
- 21- Will an indorsement transferring part of the amount payable thereby be good?
- 22- Will an indorsement to two or more indorseees severally be a negotiation?
- 23- How is this affected where part of the amount called for by an instrument has been paid?
- 24- Can one who indorses in a representative capacity negative his personal liability—if so, how?
- 25- When is an indorsement presumed to have been made?
- 26- Is there any exception as to this—if so, when?
- 27- Is there any presumption as to the place where each indorsement is made—if so, what?
- 28-§132. Under what conditions does a person become a holder in due course?
- 29- When will one who takes paper payable on demand not be deemed a holder in due course?
- 30- If a transferee receive notice of infirmity in an instrument, or a defect in the title of the person negotiating it before the full amount has been paid by him, what is the result?

- 31- What is required to make the title to the instrument defective?
- 32- What is the title of a holder who derives through a holder in due course, who is not himself a party to any fraud or illegality affecting the instrument?
- 33- What is presumed to be the title of each holder?
- 34- If the title of a person who negotiated an instrument be defective what is the holder required to prove?
- 35- What exception is there to this rule?
- 36-§133. What can you say as to the provisions of this act concerning the liability of parties?
- 37-§134. What is the rule as to possession of an instrument on presentment for payment?
- 38- Where there are several persons not partners liable primarily on an instrument, and no place of payment be specified therein, how must presentment be made?
- 39- When is delay in making presentment excused?
- 40- What is the rule under the act as to paper falling due on Saturday?
- 41- What is the rule as to demand paper in this respect?
- 42- What is the result of making an instrument payable at a bank?
- 43- What constitutes a payment in due course?
- 44-§135. May notice of dishonor be given by an agent—if so, how?
- 45- When it is given by or on behalf of a party entitled to give notice, what is the result?
- 46- If paper be dishonored in the hands of an agent, to whom may he give notice, and what is the result?
- 47- If a party be dead and there be no personal representative or he cannot be found, how should notice be given?
- 48- Where the parties live in the same place can notice by mail be given, and when must it be deposited?

- 49- If parties live in different localities and notice is given otherwise than by mail, what is the rule as to time?
- 50- How would miscarriage of the mails affect the legality of notice so given?
- 51- Does failure to give notice of dishonor for non-acceptance prejudice a holder in due course subsequent to the omission?
- 52- What is the effect of a waiver written in the body of an instrument?
- 53- When will a waiver affect an indorser only?
- 54-§136. What act under this law will discharge an instrument?
- 55- May a holder renounce his rights against any party to the instrument—if so, when?
- 56- What is its effect if it be absolute and unconditional as to the principal debtor, and when must it be made?
- 57- What is its effect on a holder in due course without notice?
- 58- When must a renunciation be in writing?
- 59- If an instrument or a signature thereon appear to be cancelled, and it is alleged that such is not really the case, what must be proved, and by whom?
- 60- State the material alterations of an instrument that will effect a discharge of it?
- 61- How would this be effected by the fact that the instrument is in the hands of a holder in due course, and what must he show?
- 62- What amount may he recover thereon in such a case?
- 63-§137. Who is the “referee in case of need” under this law?
- 64- What option has the holder in respect to such reference?
- 65- What is the exception as to presentment for acceptance on a Saturday?
- 66- Can an acceptance be for part of a bill of exchange?
- 67- How does this differ from a regular acceptance?

- 68- Where there has been acceptance for the honor of one party, may there also be a further acceptance by a different person, for the honor of another party?
- 69- What is the result of the refusal of a holder to receive payment supra protest?
- 70-§138. In what way does the act apply to checks?
- 71- What is the result of the certification of checks by the banks on which they are drawn?
- 72- Who is discharged where the holder procures the certification of a check?



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